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THE UNIVERSITY OF ALBERTA

LEGAL STATUS OF MARRIED WOMEN IN ENGLAND AND CANADA

by

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE
OF MASTER OF LAWS

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EDMONTON, ALBERTA
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THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled LEGAL STATUS OF MARRIED WOMEN IN ENGLAND AND CANADA submitted by MARGARET MORRISON MIDGLEY in partial fulfilment of the requirements for the degree of Master of Laws.

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TO MY SONS

HARRY and JOHNATHAN

ABSTRACT

The early law concerning married women was undoubtedly influenced by the prevailing feudalistic system and by the Christian attitude towards them. While women and men were deemed equal in the sight of God, on earth women were deemed to be decidedly inferior and the appropriate role for the married woman was generally that of a servant to her husband. However, while in mediaeval society the church upheld the virtues of wifely obedience and subjection to the husband, the cannon law did seek to protect the married woman by making available to her the remedies of the ecclesiastical courts.

An attempt has been made at the start of this thesis to outline the position of the married woman under the common law. Unfortunately the scope of this work does not permit an examination of the sociological causes of change throughout the centuries such as the Reformation, the Industrial Revolution, the influence of Puritanism in England and so forth. However, the influence of these sociological factors has evinced itself through the remedies of equity and subsequently through statutory reform.

It has been the purpose of this thesis to trace the changes in the law over the last 100 years, during which time the greatest changes in the legal status of the married woman have taken place.

Another purpose has been to show the differing treatment accorded the married woman in the various areas of concern in England and in Canada. Canada being the newer country has generally followed in the footsteps of England but at times has chosen to follow a different path. Again, while the Province of Alberta has been dealt with in greater detail than other

provinces, some attempt has been made to show the differing attitudes as between provinces.

Finally, using as a yardstick the reform which has already taken place in England together with general principles of justice which require equality of treatment before the law, some suggestions have been made for changes in the law in order to remove the last vestiges of discrimination against the married woman.

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CHAPTER ONE THE COMMON LAW

1. Introduction

An increased awareness of human rights in the past one hundred years has given rise to considerable changes in the law, particularly as it affects the married woman. The traditional role of the married woman probably began in prehistoric times when repeated childbearing and inferior physical strength relegated her to a subordinate position.[1] John Stuart Mill, deploring the status of married women in 1869, said, "Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house."[2] In the words of another writer, "Under the common law . . . a woman underwent 'civil death' upon marriage, forfeiting what amounted to every human right, as felons now do upon entering prison."[3]

On the other hand Hahlo contends that there have been "liberated women" in all ages and that the laws at any given time do not necessarily reflect the factual position.[4] He points out that although, until well into the 19th Century, wives were subject to the near absolute authority of their husbands, there were always strong wives ruling submissive husbands; furthermore, women in business is not a new phenomenon in that when husbands were at war, wives administered family estates and businesses.

---

[1] Report of the Royal Commission on the Status of Women in Canada 10 (1970)

[2] The Subjection of Women 147 (2d ed. 1869)

[3] Millet, Sexual Politics 67 (1970)

[4] Hahlo, Matrimonial Property Regimes: Yesterday, Today and Tomorrow (1973) 11 Osgoode L.J. 455.

However, the consensus appears to be that women still constitute an underprivileged class of society.

Ginsberg claims that "... the belief, that immutable physical and psychological differences between the sexes dictate special treatment of women, remains widespread."[5] And Kanowitz says "Few can doubt that ours is a male-dominated society; that women constitute a sociological minority suffering disadvantages comparable to those endured by racial and ethnic minorities; and that in law, politics, employment and social practices a male power-structure reigns."[6]

In order to place the main body of this thesis in perspective, an account will be given of the status of the married woman under the common law and the gradual modifications which have led to the emancipated status enjoyed by married women today.

2. The Unity Principle

The Ontario Law Reform Commission comments that the doctrine of unity of legal personality was "... no more than a result of mediaeval religious beliefs and the social conventions and expectations of that time."[7] Be that as it may, under the common law, when a woman married, her identity was considered to have been submerged in that of her husband with a resultant fusion of their legal personalities. This concept of legal unity,

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[5] The Status of Women (1972) 20 Am.J.C.L. 589.

[6] The Unfinished Revolution: Women and the Law 425 (2d ed. 1970)

[7] Ontario Law Reform Commission, Report on Family Property Law (1974)

"of one flesh" as the Bible has it,[8] is to be found in the earliest English law book, the Dialogus de Scaccario.[9] In Blackstone's oft-quoted words,[10]

> "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything; and is therefore called in our law-french a feme-covert, foemina viro co-operta: is said to be covert baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage."

A more modern writer has considered that the unity doctrine "... removed the burdens of responsibility and the sanctions of morality from any woman that entered the holy state of matrimony ... not only did she convey to him (her husband) her person and her wordly goods; but she added the entire responsibility of her personality to the weight of his own."[11]

The maxim of legal unity is misleading in that it could have been construed to mean that there was equality of participation in the "unity" whereas in fact the husband had a predominant authority.[12] However, it clearly was not so that husband and wife were one at law. As Maule J. said "In the eye of the law, no doubt, man and wife are for many purposes one; but that is a strong figurative expression, and cannot be so dealt with as that all the consequences must follow which would result from its being literally true."[13]

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[8] Genesis ii 24.

[9] II, c.18.

[10] 2 Commentaries 441 (Tucker ed. 1803)

[11] Montmorency, The Changing Status of Married Women (1897) 13 L.Q.R. 192.

[12] Williams, Legal Unity of Husband and Wife (1947) 10 M.L.R. 16.

[13] Wenman v. Ash (1853) 13 C.B. 844.

Williams points out that if the legal existence of the wife had been truly incorporated in that of the husband there would have been a complete union of property rights whereas the wife retained certain rights in her freehold property. Furthermore, in tort the wife was not non-existent in that if the husband were sued in respect of a tort committed by his wife, or himself sued concerning a tort to his wife, the wife had to be joined in the action.[14] Bromley goes so far as to say that it may be doubted whether the unity doctrine was ever a formally established rule in the common law, and that if it had been it "was but imperfectly applied", for example, a woman on marriage acquired her husband's domicile but not his nationality. Bromley notes that neither equity nor ecclesiastical law accepted this doctrine and that the married woman had access to both courts.[15]

A more accurate view of the unity of husband and wife may be as propounded by Pollock and Maitland, that "... the main idea which governs the law of husband and wife (until the intervention of equity) is not that of an 'unity of Person', but that of the guardianship, the mund, the profitable guardianship, which the husband has over the wife and over her property."[16] They maintain that while the doctrine of unity has the warrant of holy writ, it is not a consistently operative principle "... we do not treat the wife as a thing or as somewhat that is neither thing nor person; we treat her as a person." In support of their argument they quote Bracton "... for the thing is the wife's own and the husband is guardian as being the head of the wife.... (Bracton, f.429b)" and they maintain that there can be detected in the common law "... a latent idea of community between husband and wife which can not easily be suppressed."[17]

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[14] Supra n.12.

[15] Bromley, Family Law 270 (3d ed. 1966).

[16] 2 History of English Law 485 (2d ed. 1968)

Despite the innovations of equity and the subsequent statutory extensions of equitable principles, remnants of the principle of legal unity have lingered on; for example, that spouses cannot be guilty of conspiracy,[18] and that communication by one spouse to the other of a statement defamatory of a third person does not constitute publication for the purpose of the libel or slander laws.[19] In the words of Lush J.,[20]

> "The rule of unity ... still prevails as a rule in those matters wherein it was established at common law and has not been abrogated by statute. The rule at the present day lifts its head hydra-like and is on occasions applied with surprising results."

3. Property Rights

Dicey was of the view that the property rights of the married woman under the common law were the natural result of the unity principle so that, in general, "... marriage was an assignment of a woman's property rights to her husband, at any rate during coverture."[21] It has also been said that the common law of matrimonial property rested on the principle of the dependency of married women - a consequence of the extinction of her legal personality and the vesting of her property in her husband.[22]

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[17] Pollock and Maitland, supra n.16 at 406.

[18] Mawji v. R (1957) A.C. 126 where the House of Lords affirmed that the principle of legal unity was still extant in the matter of conspiracy between spouses.

[19] Wenhak v. Morgan (1888) 20 Q.B.D. 635: But Manisty J. held that public policy was a contributing factor.

[20] Husband and Wife 58 (4th ed. 1933).

At common law a married woman's personal property (or chattels personal), both those acquired before and during coverture, became absolutely vested in her husband. Such property included money, earned and otherwise, belonging to the wife. It could be disposed of by the husband either _inter vivos_ or by will and was available to his creditors. If the husband died intestate, such personal property did not revert to the wife but passed to the husband's personal representative as part of his estate.[23]

The wife's personal property which was known as paraphernalia (apparel, ornaments and so forth), also belonged to the husband during the marriage but while he could dispose of such _inter vivos_ he could not do so by will.[24] On the husband's death the wife could retain her paraphernalia against the husband's executors but it was possible for them to be taken by the husband's creditors where there was a deficiency of assets.[25]

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[21] _Law and Public Opinion in England_ 372 (2d ed. 1914).

[22] _Ontario Law Reform Commission_, _supra_ n. 7 at 4.

[23] 3 Blackstone, _Commentaries on the Law of England_ 433 (Tucker ed. 1803); _Pollock and Maitland_, _supra_ n.16 at 405; _Ontario Law Reform Commission_, _supra_ n.7 at 5.

[24] _Pollock and Maitland_; _supra_ n.16 at 405.

[25] _Pollock and Maitland_, _supra_ n.16 at 405.

This common law exception of paraphernalia from the husband's right to his wife's chattels personal appears no longer to have existed after the Married Women's Property Act of 1882.[26]

With regard to a wife's inheritable freehold estates, the husband gained seisin on marriage and acquired title to all rents and profits but only during coverture.[27] All property of which the wife was tenant in fee, either before or during coverture, could be alienated by the husband without her concurrence; she could not dispose of it.[28] The husband, however, could not dispose of it for a greater interest than his own, for example, for a longer time than the end of the marriage or after his death,[29] without her concurrence.[30] Together they could dispose of such property but this could only be effected by levying a fine, where the wife had to undergo an examination to ensure that she had consented freely. Parker J. demonstrated the law in this regard when he said:[31]

> "Marriage, therefore, must by common law have implied, on the part of the wife, such a complete surrender of her will to the will of her husband that thereafter during coverture, except when acting in auter droit, she was, if not incapable of exercising, at any rate presumed not to be exercising that free will which is, according to the principle of the common law, necessary to voluntary alienation or contract."

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[26] Masson, Templier & Co. v. De Fries (1909) 2 K.B. 831.

[27] Blackstone, supra n.23.

[28] Pollock and Maitland, supra n.16 at 404.

[29] Pollock and Maitland, supra n.16 at 404.

[30] Bromley, supra n.15 at 421.

[31] Johnson v. Clark (1908) 1 Ch. D. 312.

The learned judge then explained how this presumption could be displaced:

> "... one of the recognized methods of conveying real estate was a fine. A fine was a compromise of an action, real or fictitious, made solemnly in open court .... No fine could be levied without the leave of the Court, and in very early times such leave was refused where a married woman was concerned, unless she had been first separately examined by the justices ... but before the 18th year of Edward I the practice of the Kings Courts was not to permit a fine to which a married woman was a party, unless she had first been separately examined."

Blackstone described the process as follows:[32]

> "But, although our law in general, considers man and wife as one person, yet there are some instances in which she is separately considered as inferior to him, and acting by his compulsion. And, therefore, all deeds executed, and acts done, by her, during coverture, are void, except it be a fine, or the like matter of record, in which case she must be solely and secretly examined to learn if her act be voluntary. She cannot by will devise land to her husband, unless under special circumstances, for at the time of making it she is supposed to be under his coercion."

Where the husband predeceased his wife, the latter resumed the right to her freeholds but if the reverse were the case the property would pass to the wife's heirs subject to the husband's right to retain seisin for life as tenant by the curtesy.[33] Tenancy by the curtesy arose when a man married a woman seised of inheritable estates, that is of lands and tenements in fee-simple or fee-tail, and had by her issue born alive[34] and capable of inheriting such estate: in such a case the husband, on his wife's death, held the lands for his life as tenant by the curtesy of England.[35] However, a husband could not become tenant by the curtesy in the case of a remainder or reversion; the seisin of the wife had to be an actual seisin.[36] Again, where the wife had barred the entail and acquired an equitable fee for her separate use she could defeat her husband's right to curtesy by devising the estate:[37] but if she did not dispose of such an estate by deed or will the husband was entitled to curtesy.[38]

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[32] Supra n.10 at 443.

[33] Blackstone, supra n. 23.

With regard to chattel interests,[39] a chattel real (for example a lease for a term of years) did not vest in the husband absolutely, but he was entitled to all rents and profits therefrom and, although he could not dispose of such by will, he could sell or otherwise dispose of it during coverture.[40] Further, it has been held that an executory interest of the wife, in the nature of a remainder, would still vest in the husband on the wife's death.[41] However, while a husband could make a valid assignment of his wife's reversionary interests in leaseholds, he could not do so if the interest was of such a nature that it could not possible vest in the wife during coverture.[42]

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[34] A Treatise of Feme Coverts: Or, The Lady's Law 58 (1974). This 18th Century law book gives the following colourful account: "If a woman seised of Lands in Fee, take Husband, and by him is big with Child, and in her Travel dies, and the Child is ript out of her Body alive, he shall not be Tenant by the Curtesy, because the Child was not born during Marriage, nor in the Life-time of the Wife...."

[35] Blackstone, supra n. 23 at 125.

[36] Blackstone, supra n.23 at 127.

[37] Cooper v. Macdonald (1877) 7 Ch. D. 288.

[38] Hope v. Hope (1892) 2 Ch. D. 342.

[39] See generally Pollock and Maitland, supra n.16 at 404; Blackstone, supra n.23.

[40] Blackstone, supra n.23 at 434 "... the husband is in absolute possession of the chattel real during the coverture, by a kind of joint-tenancy with his wife ...." (underlining added)

If the husband did not alienate her chattels real inter vivos the widow took by survivorship. If, however, the wife predeceased the husband, she could have no intestate successor other than her husband and he was entitled to her chattels real and to be made the administrator of her estate, in which capacity he had the right to all movables and debts not yet reduced into possession. If the husband were liable to execution for his debts, such chattels real could be treated for all intents and purposes of his own. The wife could devise her chattels real but she could not make a will without her husband's consent and such consent if given was revocable by him up until the time the will was proved.

Concerning chattels personal which were in the nature of choses in action, for example the wife's debts or contracts, the husband was entitled to the benefit from them providing he reduced them into possession by receiving or recovering them at law. He could then bequeath them by will and they would pass to his administrators or executors but if he died before reducing them into possession they would still be choses in action and sur-

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41. Re Bellamy (1884) 25 Ch. D. 620.

42. Duberley v. Day (1852) 16 Beav., 51 E.R. 638.

vive to the wife.[43]

Coke said in this regard[44]

> "... marriage is an absolute gift of all chattels personal in possession in her own right, whether the husband survives the wife or no; but if they be in action, as debts by obligation, contract or otherwise, the husband shall not have them unless he and his wife recover them."

This early principle has been followed by the courts.[45] Up until The Married Women's Reversionary Interest Act of 1857, choses in action could not be alienated during coverture before being reduced into possession.[46] Thus, an assignment by the husband of a reversionary interest of the wife was held to be an insufficient act of reduction into possession so that the wife took by survivorship against the assignee.[47]

The husband could only reduce his wife's choses in action into possession during coverture and if he did not do so they reverted to the wife.[48] If the wife predeceased the husband, and choses in action had not been reduced into possession, the husband became entitled to them if he took out letters of administration to her estate. This applied both as regards rights _ex contractu_ and _ex debito_.[49]

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[43] Blackstone, supra n. 23 at 434.

[44] Co. Litt. 351 b.

[45] Fleet v. Perrins (1869) 4 Q.B. 510.

[46] Snell's Principles of Equity 514 (27 ed. Megarry and Baker 1973)

[47] Hornsby v. Lee (1816) 2 Madd. 16.

[48] Kanowitz, supra n.6 at 36.

[49] Ontario Law Reform Commission, supra n.7 at 3.

The doctrine of unity of legal personality produced other consequences with regard to property. If land were granted to the husband and wife and heirs, they were said to take by entireties and reserved an interest which could not become a tenancy in common by severance. Consequently, unless such an estate were jointly disposed of during coverture, the survivor took the whole.[50] Since at common law the husband was entitled to possession and rents and profits, he could encumber the property and it was liable on execution for his debts, subject to the wife's right of survivorship.[51]

In property matters the common law did not give all the advantage to the husband. There existed the system of tenancy in dower whereby on the death of a husband seised of an estate of inheritance, the wife became entitled, for the term of her natural life, to the third part of all the land and tenements of which the husband was seised at any time during the coverture.[52] Furthermore, a divorce a mensa et thoro did not destroy the dower,[53] but it was lost if a wife voluntarily left her husband to live in adultery.[54]

The wife's right of dower vested in her on marriage, reduced the husband's estate and restricted the alienability of the husband's property.

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50. Bromley, supra n.15 at 421.

51. Ontario Law Reform Commission, supra n.7 at 2.

52. Blackstone, supra n. 23 at 128.

53. Co. Litt. 32.

54. Blackstone, supra n.23 at 128.

during his lifetime.[55] The husband could not alienate his land so as to bar the wife's right to dower unless he had her concurrence.[56] Dower did not extend to the husband's chattels but from the 12th Century the wife was entitled to one third of the husband's personalty if there were children, and to one half if there were none. This right had fallen into desuetude by the end of the 17th Century by which time only dower and curtesy remained.[57]

In leaving the subject of marital property rights at common law it should be noted that so absolute was the right of the husband to the wife's property that there existed, until the Married Women's Property Act of 1882, a doctrine of fraud on the marital rights whereby any secret disposition by the wife of her property during courtship was deemed to be a fraud upon the husband. Upon discovery, he could be relieved up to ten years after the marriage - even if he had not known of the fraud until then.[58]

4. Liability in Tort and Contract

The married woman retained her legal identity in so far as the law recognized that she was capable of committing a tort upon a third party and that a tort could be inflicted upon her. However, since the wife had no procedural existence apart from her husband, and on the general principle that the husband was entitled to reduce the wife's choses in action into possession, the husband always had to be joined in the action; the wife could not sue or be sued alone.[59] Since the husband was personally liable for the torts of his wife, both before and during coverture,[60] the requirement that he be joined as co-defendant meant that where the wife was the tortfeasor, there was a joint liability but on the death of the wife, since liability only attached to the husband qua husband, the husband ceased to be liable.[61] The husband's liability for his wife's torts was justified not only on the legal ground that she had no procedural personality, but also on the moral ground that the husband stood possessed of all the wife's property and, if successful in an action, he would receive the damages.[62]

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[55] Kanowitz, supra n.6 at 37.

[56] Pollock and Maitland, supra n.16 at 404.

[57] Hahlo, supra n.4 at 463.

[58] Montmorency, supra n.11 at 195.

Actions in tort between husband and wife were not possible at common law because of the unity principle.[63] The wife could not sue her husband for trover[64] or for slander[65] or assault[66] because neither spouse was deemed capable of acquiring civil rights against the other.[67] Thus it was impossible for a husband to claim against a deceased wife's estate for damage in respect of a tort committed against the husband by the wife but it was the substantive rule rather than the procedural rule which determined the matter.[68]

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[59] Ontario Law Reform Report on Family Law, Part I Torts 12 (1969); Bromley, supra n.15 at 278.

[60] Kanowitz, supra n.6 at 37.

[61] Cupel v. Powell (1864) 17 C.B. (N.S.) 748.

[62] Graveson and Crane, Century of Family Law 91 (1957).

[63] Winfield on Torts 110 (2d. ed. 1943)

[64] McGuire v. McGuire (1873) 23 V.C.C.P. 123.

[65] Hill v. Hill (1929) 2 D.L.R. 735.

[66] Phillips v. Barnet (1876) 1 Q.B.D. 436.

[67] Id. at 440.

At common law a wife could not contract on her own behalf either with her husband or with a third party, except where the husband had been banished, transported or had abjured the realm. Thus neither the wife nor the husband could sue or be sued on any contract made by the wife[69] even although she were living apart from her husband with separate maintenance[70] or engaging in trade on her own account.[71] Kahn-Freund says the reasons why a contract between husband and wife was considered void was the lack of contractual capacity on the part of the wife and the fact that a man could not contract with himself.[72]

The benefit of all pre-nuptial contracts of the wife vested in the husband on marriage and both spouses were liable to be jointly sued thereon during coverture: but if the husband predeceased the wife, and such a pre-nuptial contract of the wife was still executory, the wife and not the husband's personal representatives could sue or be sued thereon.[73] However, the wife could contract as her husband's agent, in particular to acquire goods and services for the household. The husband was thereby bound as principal and from his conduct in holding the wife out as his agent she derived her authority.[74] A wife was not automatically deemed to be the agent of the husband when pledging the husband's credit;[75] any presumption of authority could be rebutted.[76] In cases of separation or desertion the wife's right to pledge her husband's credit for necessaries was based on her right to be maintained by her husband, so that if her right to be maintained ceased (for example on adultery) so did her right to pledge the husband's credit.[77]

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[68] Kahn-Freund, Inconsistencies and Injustices in the Law of Husband and Wife (1952) 15 M.L.R. 141.

[69] Bromley, supra n.15 at 271.

[70] Lean v. Schultz (1778) 2W.Bl.1195.

[71] Clayton v. Adams (1796) 6 Term Rep. 604.

[72] Supra n.68 at 136.

[73] Bromley, supra n.15 at 272.

Blackstone described the wife's disability and the husband's liability in this regard as follows:[78]

> "..... a man cannot grant anything to his wife, or enter into separate covenant with her: for the grant would be to suppose her separate existence; and to covenent with her would be only to covenant with himself; and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. The husband is bound to provide his wife with necessaries by law, as much as himself: and if she contracts debts for them, he is oblieged to pay these; but for anything besides necessaries, he is not chargeable. Also, if a wife elopes, and lives with another man, the husband is not chargeable even for necessaries..... If the wife be indebted before marriage, the husband it bound afterwards to pay the debt; for he has adopted her and her circumstances together."

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[74] Kahn-Freund, Matrimonial Property Law in England in Friedmann (ed) Matrimonial Property Law 271 (1955).

[75] Debenham v. Mellon (1880) 6 A.C. 24.

[76] Morel v. Westmoreland (1904) A.C. 11.

[77] Kahn-Freund, supra n.74.

[78] Supra n.10 at 442.

5. Criminal Proceedings and Evidence

A wife and husband, because of the unity principle, could not be found guilty of conspiracy,[79] although the principle appears to have been breached when a wife, husband and another were so found.[80]

At common law one spouse could not prosecute the other except for crimes involving personal injury.[81] It was held, however, in R. v. Mayor of London[82] that a wife could not prosecute her husband for criminal libel, a case that Williams has described as "very doubtful".[83]

A wife or husband could not be found guilty of stealing from each other because of the notional unity of possession.[84] The notional unity of personality, however, could not have been the reason for the rule that a wife who hid her felon husband was not guilty as an accessory after the fact, because the reverse situation did not obtain.[85] Mendes Da Costa quoting Coke says "... a man may be accessory to his wife but the wife cannot be accessory to her husband... for by the law divine she is not bound to discover the offence of her husband."[86]

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[79] Williams, supra n.12 at 20.

[80] R. v. Cope (1718/19) 1 Str.144.

[81] Williams, supra n.12 at 20.

[82] (1886) 16 Q.B.D.772.

[83] Supra n.12 at 24.

[84] Williams, supra n.12 at 24.

[85] Williams, supra n.12 at 26.

[86] Graveson and Crane, supra n.62 at 170.

There existed at common law a presumption that if a wife committed certain offences in her husband's presence, she did so under his coercion so that he, not she, was prima facie liable.[87] The limitation on the criminal capacity of married women appears to have resulted from the principle of unity of husband and wife but Perkins[88] suggests that the underlying reason for the doctrine of presumed coercion may have been to spare the lives of women in a society where over two hundred offences carried the death penalty. He points out that "Benefit of the Clergy", which enabled offending clergymen to avoid the death penalty, by pleading their cloth came to be extended to all men who could read. The common law, not being prepared to extend this protection to women, achieved the same end by adopting the fiction that a wife's criminal offence was at the bidding of her husband. On the other hand, Isaacs, C.J. claimed on this point "..... the presumption is not one which rests on technical grounds, but is based on a knowledge and understanding of the relations that usually exist between husband and wife."[89]

This presumption, that the wife only acted at her husband's bidding, was prima facie only and capable of rebuttal so that if it could be shown that the wife acted independently she could be found guilty.[90] The presumption did not extend to crimes of extreme gravity such as treason or murder.[91] It has been held that the presumption did not apply to misdemeanours[92] on the other hand Kenny says it applied to all misdemeanours except those connected with management of the household.[93] It was clear, however, that the presumption did not extend to a contravention of express statutory provisions.[94]

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[87] Bromley, supra n.15 at 281.

[88] Perkins, Criminal Law 796 (1957).

[89] R. v. Green (1913) 9 Cr.App.R.228.

[90] R. v. Cohen (1868) 11 Cox C.C. 99.

Concerning the husband's right to chastise his wife, Mendes Da Costa quotes Bacon, "The husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner."[95] At a later date Coleridge J. says "For the happiness and the honour of both parties it (the law) places the wife under the guardianship of the husband, and entitles him, for the sake of both, to protect her from the danger of unrestrained intercourse with the world, by enforcing cohabitation and a common residence."[96] Not until the celebrated case of R. v. Jackson in 1891 was it finally decided that the husband did not have a legal right to inflict personal chastisement on his wife or to imprison her.[97]

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[91] Countess of Somerset's Case (1616) 2 State Tr. 951.

[92] R. v. Cruse (1838) 8 C. & P. 541.

[93] Kenny Outlines of Criminal Law (17 ed. 1958).

[94] R. v. Davis 9 J.Cr.L.81.

[95] Graveson and Crane, supra n.62 at 179.

[96] Re Cochrane (1840) 8 Dowl. 633.

[97] (1891) 1 Q.B. 671.

With regard to evidence, at common law neither the parties to an action nor their spouses were competent witnesses. Williams notes that, with regard to the disability of spouses, Blackstone attributed this rule to the doctrine of unity but Coke suggested the reason to have been that "... it might be a cause of implacable discord and dissension between the husband and the wife...."[98] Bromley is of the view that the reason was not the unity doctrine but rather public policy in that it was undesirable to have a spouse testify against the other.[99] It has also been suggested that since the evidence or interested parties is unreliable and since husband and wife were one, they must have the same interest[100] and hence would be unreliable witnesses against the other.

The common law rules of evidence were greatly developed and defined subsequently, both by Parliament and the appellate courts, as shall be shown later.

6. Matrimonial Relief

Under the Reformation the sacrament of marriage could not be undone and the only way of effecting a separation[101] was to show that the marriage had been void _ab initio_ when a divorce _a vinculo matrimonii_ could be had -

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[98] _Supra_ n.12 at 19.

[99] _Supra_ n.15 at 283.

[100] _Graveson and Crane_, _supra_ n.62 at 144.

[101] Marriage could be dissolved by a private Act of Parliament, which only the very rich could afford.

with the automatic bastardizing of any children born to the marriage.[102] There was also divorce a mensa et thoro but this was merely a form of judicial separation and gave no right to re-marriage. Graveson quotes Lord Lyndhurst, speaking on the second reading of the Matrimonial Causes Bill as he describes the plight of the married woman who had been driven to obtain a divorce a mensa et thoro:[103]

> "From that moment the wife is almost in a state of outlawry. She may not enter into a contract or, if she do, she has no means of enforcing it. The law, so far from protecting, oppresses her. She is homeless, helpless, hopeless, and almost destitute of civil rights."

Administration of the law in this area was in the hands of the Church of England Ecclesiastical courts and the law applied was founded on pre-Reformation Canon Law, as amended by statute from time to time. The unsatisfactory state of affairs in matrimonial law obtained largely until the Matrimonial Causes Act of 1857, which will be referred to later.

With regard to children, the mother had few rights, the father having exclusive control and guardianship over the children of the marriage and on his death, legal custody passed to the guardian appointed by the father's will.[104]

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[102] Montmorency, supra n.11 at 189.

[103] Supra n.62 at 6.

[104] Graveson and Crane, supra n.62 at 17.

In Montmorency's words, apart from a limited intervention by Chancery, "the old law stood in its foolishness naked and unashamed until June 1886."[105]

This brief review outlines the married woman's situation at common law which fortunately was to undergo change as the emancipation of women in general began to take place. Before discussing the position of the modern married woman, a look will now be taken at the part played by equity and the subsequent statutory innovations which helped to bring about the emancipation enjoyed by women today.

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[105] Supra n.11 at 197.

1. THE INFLUENCE OF EQUITY

While a woman could, by pre-nuptial conveyance, settle her own property to her separate use,[1] the fact that the right to the rents and profits from her freeholds and possibly a life interest therein, passed to her husband on marriage was, to use Potter's understatement, "something of a hardship".[2] The Civil War, "with its attendant cloud of family settlements"[3] caused the Restoration Chancellors to elaborate on the doctrine of the separate estate to enable the married woman to deal with her property as a feme sole, without interference from her husband, and in order to give effect to the wishes of the settlor. Dicey assures us that the aim of Chancery was not so much to increase the property rights of married women as to exclude the husband who was, in the view of equity lawyers, "the 'enemy', against whose exhorbitant common law rights the Court of Chancery waged constant war."[4] The view has been expressed that there was no urgent need for protection before this time and that the common law rules probably sufficed for mediaeval society but eventually had to be adapted to meet the needs of the mercantile and capitalist society which had been developing since the 16th Century.[5]

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[1] Although if the intent were to deprive the future husband the conveyance would be invalid - Countess of Strathmore v. Bowes (1789) 1 Ves. Jun.22.

[2] An Historical Introduction to English Law and its Institutions 512 (2d ed. 1943).

[3] Jenks, A Short History of English Law 226 (2d. ed. 1920).

[4] Law and Opinion in England 372 (2d. ed. 1914).

[5] Kahn-Freund, Matrimonial Property Law in England in W. Friedman (ed). Matrimonial Property Law 273 (1955).

The first modification of equity was known as the wife's equity to a settlement whereby if the husband took court action in order to reduce the wife's property into possession the court, on the principle that he who seeks equity must do equity, would compel the husband to settle part of the property on his wife and children.[6] Eventually this claim could be initiated by the wife[7] or, after her death, by her children.[8] This doctrine gave the wife priority over the husband's assignees or creditors with regard to her property[9] but if the husband were able to reduce into possession the wife's choses in action without the aid of Chancery, the wife was deprived of the equitable remedy.[10]

The second modification of equity was the doctrine of the separate estate, "the most important contribution of equity to the law of the married woman's property".[11] The underlying principle was that although a person could not himself hold property, it could be held for his benefit by a trustee.[12] Thus property given to a trustee for the separate use of a married woman, whether before or after marriage, became her separate property. The doctrine of the separate estate applied to personal as well as real property[13] and was protection both against the husband and against his judgment creditors.[14] A married woman could dispose of such separate property not only inter vivos by gift, transfer or conveyance, but also by will, thus breaching the common law rule that a woman under coverture had no testamentary capacity; the principle being that property for her sole, separate use carried with it the right of disposition.[15] It was also immaterial whether the interest was in possession or in reversion.[16]

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[6] Snell's Principles of Equity 514 (27 ed. Megarry and Baker 1973)

[7] Elibank v. Montolieu (1801) 5 Ves. 737.

[8] Murray v. Lord Elibank (1804) 10 Ves. 84.

[9] Ontario Law Reform Commission Report on Family Property Law 8 (1974).

[10] Kanowitz, Women and the Law: The Unfinished Revolution 39 (1969)

[11] Khetarpal, Property Rights of Husband and Wife: A Brief Survey (1969) 7 Alta. L.Rev. 39.

[12] Dicey, supra n.4 at 372.

[13] Hulme v. Tenant (1778) 28 E.R. 958.

Later, if no trustee were appointed, by virtue of the fact that the husband became the legal owner of the settled property, Chancery ruled that the husband must hold as trustee for the wife and must abide by the terms of the trust, deriving no greater interest than if it had been formally conveyed to trustees.[17] It was essential, however, that there be a clear intention to settle on the married woman.[18] And so, as Westbury L.C. said "... with respect to separate property, the feme covert is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is sui juris."[19]

The third innovation of equity was the doctrine of restraint on anticipation, the purpose of which was threefold: to prevent undue influence

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14. Newlands v. Paynter (1840) 4 My. & Cr. 408.
15. Fettiplace v. Gorges (1789) 1 Ves. Jun. 46.
16. Snell, supra n. 6 at 514.
17. Dicey, supra n.4 at 372.
18. Ontario Law Reform Commission, supra n.9 at 8.
19. Taylor v. Meads (1865) 34 L. J. Ch. 203.

being exerted by a husband so that the wife would be economically independent of him with regard to her settled property; to carry out the wishes of the settlor; and to protect the interests of those entitled on the death of the wife.[20] Invented by Lord Thurlow[21] on the premise that equity was entitled to extend its own rules on the separate estate,[22] it disabled a woman, to whom property had been given for her separate use without power of anticipation, from alienating it or anticipating future income during coverture.[23] Thus, a wife could not charge such property to her debts, and because the restraint could be applied either to the property itself or to the income therefrom or both, she could not assign or otherwise dispose of the income before it fell due in order to convey the property to her husband or a third party.[24] This restraint on anticipation attached and disattached *toties quoties* so that if the husband died the property was freed from the restraint but if the woman remarried, the restraint was automatically re-attached.[25]

The restraint on anticipation was contrary to equity's general tendency to promote free alienability of assets, and the fact that equity permitted such restraints indicates how remote was the idea of sex equality to equity lawyers and how strongly they felt that a married woman was greatly in need of protection.[26] As Jenks put it[27]

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[20] *Ontario Law Reform Commission*, *supra* n.9 at 7.

[21] *Brandon* v. *Robinson* (1811) 18 Ves. 434.

[22] *Tullett* v. *Armstrong* (1840) 4. My. & Cr. 377.

[23] *Snell*, *supra* n.6 at 514.

[24] *Ontario Law Reform Commission*, *supra* n.9 at 7.

[25] *Snell*, *supra* n.6 at 514.

> "It is not difficult to see that, to place a married woman in the legal position of a man, as regards her separate property, is to afford her very little real protection. A married woman needs to be protected, not only against her husband, but against herself."

The chief difficulty with the reforms of equity was that they "liberated" only the daughters of the wealthy, as Kahn-Freund says "... .the limitations of equity were as obvious as its achievements."[28] The doctrine of the separate estate could only be invoked through the mechanism of a will or a marriage settlement and the latter was such a cumbersome and expensive vehicle that only the rich could afford it.[29] Dicey points out that married women without settlements were still deprived by the severity of the common law of the whole of the income from their property but that probably this was a comparatively small segment of the society of that day and attracted little attention.[30] Furthermore, although equity enabled a married woman to dispose of her separate property by will, she acquired no testamentary capacity with regard to her other property which was not technically "separate property". Dicey summed

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26. Kahn-Freund, supra n.5 at 275.

27. Supra n.3 at 229.

28. Kahn-Freund, supra n.5 at 276.

29. Khetarpal, supra n.11 at 41.

30. Supra n.4 at 382.

up the situation by saying that the outcome would not have been too bad if Chancery had been able to supercede the common law and extend to all married women the help it afforded those with marriage settlements but as it was, the two systems of common law and equity existed side by side, unmingled, until the statutory reform, thus providing one law for the rich and another for the poor.[31]

While equity never gave a married woman true contractual capacity, in that she could not make a contract which bound her personally,[32] the concept of the woman's equitable separate estate gave rise to the beginnings of contractual capacity for the married woman. Unless expressly forbidden by the instrument, she could only bind her own separate property which belonged to her at the time the debt was incurred; she could not bind property she would subsequently acquire nor property to which she was then entitled but which was subject to restraint upon anticipation.[33]

2. STATUTORY REFORM

a) Property Rights

In the second half of the 19th Century, the social transformation wrought by the Industrial Revolution[34] caused public opinion to demand that

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31. Supra n.4 at 383.

32. Durrant v. Ricketts (1881) 8 Q.B.D. 177.

33. Pike v. Fitzgibbon (1881) 17 Ch. D. 454.

34. By 1870 a greatly increased number of women were capable of earning good salaries as teachers, musicians, actresses etc. See Dicey, supra n.4 at 384.

the legal status of the married woman and her property rights should be adapted to her changed place in society.[35] Dicey suggests that one of the reasons for delay in statutory reform was that any changes in the law affecting family life "always offend the natural conservatism of ordinary citizens".[36]

The underlying policy in the various Married Women's Property Acts was to secure for all married women the advantages already enjoyed by those whose property was in the form of settlement and, in general, to give equality in status and capacity and promote a regime of separation of property. But the method used, that of extending equitable principles, precluded the possibility of a clear statement of the law and resulted in a series of complicated and often ambiguous statutes. It has been suggested that English draftsmen always shrank from general clarifying formulae, preferring to achieve important reforms through numerous small extensions to existing rules.[37] This method had the advantage for the legislature, of avoiding a revolution in family law and also safeguarding existing equitable arrangements for the protection of family wealth by restraint on anticipation. As shall be seen, the law of property in relation to husband and wife proceeded in general according to the English view of independent and distinct rights rather than upon any assumption of community of goods between them.[38]

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35. Kahn-Freund, supra n.5 at 276.

36. Supra n.4 at 385.

37. Potter, supra n.2 at 276.

38. Graveson and Crane, A Century of Family Law xiii (1957).

Touching, in chronological sequence, on the Property Acts which affected married women in the Victorian era, the first of importance was that known as Malins' Act of 1857 which enabled a married woman to dispose of reversionary interests in personal estate as if she were a feme sole and to release or extinguish her right to a settlement out of any personal estate to which she might be entitled, providing the husband concurred and there was no restraint on alienation.[39]

The Divorce and Matrimonial Causes Act of 1857 gave the married woman the status of a feme sole with regard to property she acquired or inherited during a period of judicial separation.[40] Protection was also afforded a married woman against her husband or his creditors after he had deserted her, with respect to her earnings or property acquired after the desertion, such belonging to the wife as if she were a feme sole.[41]

1870 and the first Married Women's Property Act saw the first real attempt "to place the law governing the property of married women on a just foundation"[42] by classifying their earnings and savings as their own property, held and settled to their separate use.[43] The rents and profits of freehold property a married woman might inherit were likewise her separate property[44] but Parliament's blindness to just treatment is evident in a later provision whereby, if a father devised and bequeathed his wealth to his married daughter, the husband took it (except £200 in money) but if the father died intestate, the married daughter acquired it all for her separate use.[45] Evidently the 1870 Act, as originally passed through the House of Commons, would have generalized for all married women what equity had previously done for those with settlements but the House of Lords drastically reduced the scope of the Bill; as Olive Stone comments,[46] "It is improbable that a single member of the House of Lords who voted on the Bill had a wife without property settled to her separate use. Refusal to pass the Bill in its original form was therefore an astounding example of class distinction."

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[39] 20 & 21 Vict. c.57 s.1.

[40] 21 & 22 Vict. c.85 s.21.

[41] Id.

[42] Dicey, supra n.4 at 384.

[43] 33 & 34 Vict. c.93 ss.1 and 2.

The Married Women's Property Act of 1882[47] effected the reforms originally conceived for the 1870 legislation, the chief of which was that a married woman should be capable of acquiring, holding and disposing by will of any real or personal property as her separate property as if she were a feme sole, without the intervention of trustees.[48] This applied to property belonging to the woman on marriage or acquired thereafter and included earnings or property gained by her in employment or by the exercise of any literary, artistic or scientific skill.[49] However, the new legislation left marriage settlements untouched also retraints on anticipation[50] and did not affect any rights vested in the marriage prior to 1882.[51] It is of interest that by section 20 of this Act a married woman with separate property became liable for the maintenance of her husband.

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[44] Id. s.8.

[45] Id. s.7.

[46] The Status of Women in Great Britain 20 Am.J.Comp.L.592.

[47] 45 & 46 Vict. cap.75.

[48] Id. s.1 (1).

The married woman was thus put on the same footing as a man with regard to the holding of property and the incidence of marriage settlements, even among the wealthy, declined. The husband no longer had an estate during the coverture in the wife's freeholds as they had become in law her separate property and whereas, before 1882, her chattels real were held in a kind of joint tenancy, so that on predeceasing him the husband had them by his marital right, this was no longer so.[52] Thus a widower could only claim an interest in his deceased wife's property acquired after 1882 if she died intestate regarding such property. The doctrine of fraud upon a husband's marital rights was no longer applicable. Furthermore, the husband no longer had an estate by entireties in any real or personal estate conveyed or devised to both spouses during marriage;[53] the husband and wife now held either as joint tenants or as tenants in common, each being entitled to one undivided moiety with or without the right of survivorship.[54] However, the 1882 Act did not appear to have affected the common law position regarding paraphernalia, the wife had still no right in such property until widowed.[55]

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[49] Id. s.2.

[50] Id. s.19.

[51] Bromley, Family Law 426 (3rd ed. 1966).

[52] Brown, The Married Women's Property Acts 1870, 1874, 1882 & 1884 5 (6th ed. 1891).

[53] Ward v. Ward 14 Ch.D.506; Thornley v. Thornley (1893) 2 Ch.D.229.

Prior to 1882 a married woman's capacity to make a will was generally limited in that, in the absence of settled property, she could only devise real or personal estate where the husband concurred, such concurrence being withdrawable at any time. By virtue of the 1882 Act a married woman's testamentary capacity increased but not to the degree which might have been expected in that her will made during coverture operated only on such separate property as she was possessed of or became entitled to during coverture.[56] Thus, unless the wife re-executed her will on becoming discovert, a will purporting to pass all her property was not effectual to dispose of property which she might have acquired after coverture, for example on her husband's death,[60] for it had never technically been her separate property.

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[54] Jupp v. Buckwell 39 Ch.D.148. But see Mander v. Harris 27 Ch.D.166.

[55] Seymour v. Tresilian 3 Atk. 358.

[56] Re Price, Stafford v. Stafford (1885) 28 Ch.D. 709.

[60] Re Greene, Mansfield v. Mansfield (1890) 43 Ch.D. 12.

It can now be seen that while equality of status and separation of property appeared together as an extension of the conveyancing device of equity, they were really two distinct unrelated concepts; but the fact that they were intertwined in law meant that coextensive with statutory separate property rights were improvements in contractual and testamentary capacity. In other words, the status of equality of the married woman was an adjunct of her separate property, the former existing solely for the purpose of the latter.[61] The fact that the newly acquired capacities of the married woman were not in abstracto but strictly in relation to her separate property created problems requiring subsequent amending legislation, both with regard to property and to married women's liabilities in contract and tort, as shall later be seen. Meanwhile some judicial decisions subsequent to the 1882 Act tended to interpret the new legislation in a restrictive fashion. For example, In re Harkness & Allsopp's Contract[62] it was held that despite the 1882 Act, a woman married since the Act who was a trustee of real estate could not convey to a purchaser without her husband's concurrence. On the other hand in Wassell v. Leggatt[63] it was held that where a husband had wrongfully deprived his wife of money to which she was entitled as her separate property, she could recover it on the husband's death with interest from his executors and the Statute of Limitations was no defence. There was also a tendency to weaken the effect of restraints on anticipation which had been deliberately retained in married women's property legislation, for example, by holding that restraints did not apply to income accrued due on separate property[64] and by giving immediate effect to a direction in a will for payment of an absolute gift despite words restraining anticipation.[65] Restraints on anticipation, it may be noted, could not be included in a settlement on a man.[66] It was also held unequivocably by the courts that there was no distinction between the separate property of a married woman and property settled on her for her separate use.[67]

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[61] Kahn-Freund, supra n.5 at 278.

[62] (1896) 2 Ch.D. 358.

[63] (1896) 1 Ch.D. 554.

By the Married Women's Property Act of 1884 fines and recoveries were abolished.[68] By the Married Women's Property Act of 1893 the widow's inability to devise property acquired on widowhood by a will executed during coverture was removed;[69] her will was now deemed to speak from the date of her death and thus included all the separate property held by her at that time without the need to republish. As has been seen, where a married woman predeceased her husband without disposing of her separate property either inter vivos or by will, it became vested in the husband; however where the husband died intestate before the wife, the widow took one third,

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64. Hood Barrs v. Heriot (1896) A.C. 174.
65. Hotchkiss v. Mayor (1896) W.N. 175 (12).
66. Montmorency, The Changing Status of Married Women (1897) 13 L.Q.R. 198.
67. Re Lumley (1896) 2 Ch.D. 694.
68. 47 & 48 Vict. c.14 s.1
69. 56 & 57 Vict. c.63 s.3.

or one half if there were issue. By the Intestates Estates Act of 1890, a widow without issue was able to take the whole of the real and personal estate if not in excess of 500.[70] Since there were no legal rights of inheritance at English Law, spouses could disinherit each other by will. This unsatisfactory state of affairs was remedied by The Inheritance (Family Provision) Act of 1938 which safeguarded the interests of the wife where the husband had left a will but failed to make adequate provision for her;[71] she could now apply to the courts for maintenance as a dependant of the deceased.

The Administration of Estates Act of 1925 which abolished dower and curtesy[72] further enhanced a widow's position where the husband died intestate by giving her a greater interest[73] and this trend was continued by The Intestates' Estates Act of 1952[74] by which time the widow had generally become the universal successor.

The Law Reform (Married Women and Tortfeasors) Act 1935 finally abolished the "separate property" concept, giving full effect to the principle of separation of goods between husband and wife.[75] The Act provided that a married woman should "be capable of acquiring, holding and disposing of, any property ... in all respects as if she were a feme sole",[76] and that all property held by her, being her separate property immediately before the Act, or belonging to her when married after the Act, or when subsequently acquired by her after the Act, "... shall belong to her in all respect as if she were a feme sole and may be disposed of accordingly."[77] This Act contained a proviso retaining the validity of restraints on anticipation created prior to the Act but declared void any such restraints created thereafter.[78]

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[70] 53 & 54 Vict. c.39 s.46.

[71] 1 & 2 Geo.6, c.45.

[72] 15 Geo.5, c.23 s.45.

[73] *Id*. s.46.

[74] 15 & 16 Geo. 6 & 1 Eliz. 2, c.64.

[75] Hahlo, *Matrimonial Property Regimes: Yesterday, Today & Tomorrow* (1973) 11 Osgoode L.J. 465.

Placing the married woman in the same position as an unmarried woman or man with regard to her property threw upon her liabilities other than purely contractual ones. For example, when the husband had been entitled to his wife's personalty he had been liable for her funeral expenses if she predeceased him. The courts subsequently held that the Administration of Estates Act of 1925 was equally applicable to the estate of the wife as to the husband and therefore the wife's estate was liable for her funeral expenses.[79]

b) Liability in Contract

The first statutory inroads on the married woman's common law incapacity to contract was made in the Matrimonial Causes Act of 1857[80] when a woman judicially separated from her husband was enabled to sue and be sued as if a feme sole. However this applied only to a very limited class of women and the majority were still unable to contract. Some relief was obtained by the Married Women's Property Act of 1870[81] whereby a married woman could maintain an action to recover her earnings and other property which was her separate property.[82] Relief was also given to the husband who was declared no longer liable for his wife's pre-nuptial contracts.[83] Placing the liability on a married woman for her pre-nuptial contracts worked an injustice on the wife's creditors, however, who usually found that there was nothing upon which to levy execution since the wife's property was mostly vested in the husband. This state of affairs also made it very difficult for a woman engaged to be married to obtain credit.[84]

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[76] 25 & 26 Geo.5, c.30 Part 1 s.1.

[77] Id. s.2(1).

[78] Id. ss.2(1), 2(2).

[79] Rees v. Hughes (1946) K.B. 517.

[80] 20 & 21 Vict. c.85 s.26.

The Married Women's Property Act of 1874 attempted to remedy this blunder by repealing the relevant section of the 1870 Act but limited the husband's liability for his wife's ante-nuptial contracts to the extent of the wife's property vested in him by virtue of the marriage.[85]

The most important statutory reform in the Victorian period was the Married Women's Property Act of 1882 which, with regard to contract, provided that the married woman could contract and be liable with regard her property and sue and be sued thereon as a feme sole without the need to join her husband in the action.[86] Furthermore, every contract entered into by her was deemed to be with respect to and to bind her separate property, both that possessed at time of contract and that subsequently acquired.[87]

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[81] 33 & 34 Vict. c.93.

[82] Id. s.11.

[83] Id. s.12.

[84] Bromley, supra n.51 at 272.

[85] 37 & 38 Vict. c.50 ss.1,2. This was also affirmed in the Married Women's Property Act 1882 s.14.

A married woman, in respect of her separate property, could not be made bankrupt[88] if carrying on a trade separate from her husband and she continued to be liable to the extent of her separate property for all her pre-nuptial debts and contracts.[89] Her husband, however, was still liable for pre-nuptial debts and contracts to the extent of property belonging to his wife which he had acquired[90] and so both could be sued jointly where a creditor sought execution against both of them.[91] Both existing and future settlements were preserved by this Act as was the power to impose restraints on anticipation ~~but~~ no such restraints were valid against debts contracted by the wife before marriage and no settlement was to have greater force against a wife's creditors than against any man's creditors.[92]

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[86] 45 & 46 Vict. c.75, s.1(2).

[87] Id. ss.1(3), 1(4).

[88] Id. s.1(5).

[89] Id. s.13.

[90] Id. s.14.

[91] Id. s.15.

[92] Id. s.19. See also Barnet v. Howard (1900) 2 Q.B. 784 where held that not only was property subject to restraint not liable in contract but remained not liable after husband's death when restraint had ceased.

The technique of extending the equitable doctrine of separate property rather than placing the married woman in the position of a feme sole had some unforeseen results. The married woman did not acquire true contractual capacity in that only her separate property was bound by her contracts, she was not bound personally.[93] In addition, if she were possessed of no separate property at the time of entering into a contract, any she might subsequently acquire was not bound thereby.[94]

The courts' treatment of the 1882 Act has been criticized on the ground that the Act had been interpreted in a "perversely narrow spirit";[95] that whereas the legislative intent had been to confer upon married women the legal capacity of a feme sole the judiciary had been seized of the notion that there had been but statutory authority given to the prior rules of equity, with the consequent anomalies to which reference has just been made. It was argued that if the courts had adhered to general principles of contract, of a personal obligation to perform a promise, there would have been no need for amending legislation. Dicey however was of the view that the reason for this approach of the judiciary was that the upper classes thought they were merely extending to other married women what had been available to them in equity and this construction had the advantage of preserving restraints on anticipation.[96]

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[93] Draycott v. Harrison (1886) 17 Q.B.D. 147; Scott v. Morley (1888) 20 Q.B.D. 120 where held that a married woman could not be committed for default under the Debtors Act 1869, because there was no personal liability.

[94] Palliser v. Gurney (1887) 19 Q.B.D. 519.

[95] Williams, Cyprian, Husband's Liability for his Wife's Torts (1900) 16 L.Q.R. 193.

[96] Supra n.4 at 388.

It appeared, therefore, that the courts so construed the Act that it was not a question of giving the married woman full contractual capacity with limited liability but that the married woman's capacity to contract depended on her possession of property, a qualification "as irrelevant to her capacity to contract as her having blue eyes or a straight nose",[97] And so defeated creditors still found that the wife had all the rights but not the liabilities of independence.[98]

Anomalies in the 1882 Act were removed by the Married Women's Property Act of 1893 which provided that a married woman was liable on her contracts whether she was possessed of separate property or not at the time she entered into contract - always providing that property subject to restraint or anticipation should not be available to satisfy any contractual liability.[99] The liability of a married woman was thus still proprietary and not personal; she could not be imprisoned for debt or made bankrupt, unless in business on her own account, and since property subject to restraint was safeguarded, the rich could still protect their wealth from creditors.

With the passing of the Law Reform (Married Women & Tortfeasors) Act of 1935 and the abolition of the separate estate, the married woman finally became personally liable in respect of her debts and contracts, capable of suing and being sued subject to bankruptcy and enforcement of judgments in all respects as if a feme sole.[100] She was now fully capable of entering into contract not only with a third person but also with her husband,[101] although in the latter case the contract had to be more than a mere domestic arrangement.[102] This Act also abolished the husband's liability for his wife's ante-nuptial contracts and debts.[103]

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[97] Notes (1891) 7 L.Q.R. 205.

[98] Graveson & Crane, supra n.38 at 123.

[99] 56 & 57 Vict. c.63 s.1.

And so by 1935 the liability of the married woman was equated with that of the single woman not only by establishing her capacity to contract during marriage but also by regulating her contractual liability during marriage without reference to the time when the liability was incurred: a married woman had thus become liable on pre-nuptial contracts with her husband.[104]

c) Liability in Tort

Winfield has described the English law with regard to tort prior to 1935 as presenting "a rather barbarous hotchpot of humiliating disabilities and scandalous immunities".[105] Another writer with regard to tort, has described the last century as "a flight from the fiction of conjugal unity" but on relfection then says "... a closer examination of the halting, hesitating course described by the law would make one pause before fixing such a tage to the period".[106]

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[100] 25 & 26 Geo.5 s.1.

[101] Contract with her spouse had been possible after the 1882 Act but not before as per Wills J. in Butler v. Butler (1885) 14 Q.B.D. 831.

[102] Balfour v. Balfour (1919) 2 K.B. 578.

[103] 25 & 26 Geo.5 s.3.

[104] Kahn-Freund, The Law of Husband and Wife 15 M.L.R. 140.

[105] 14 Can. Bar Rev. 653 (1936).

The first breach in the common law rule that spouses could not sue each other in tort came with the Matrimonial Causes Act of 1857 when such action became possible if a judicial separation order was in force.[107] After the Married Women's Property Act of 1870 a married woman was able to maintain an action to recover her separate property "against all persons whomsoever",[108] which presumably included the husband. This produced both anomalies and injustices: it was anomalous that the husband could not sue his wife for her damage to his property and that there was no action possible between them for other wrongs such as slander; and it was unjust that third party rights could be prejudiced if the tortfeasor and the victim were married.[109] Furthermore on the death of a spouse the survivor could not bring action against the deceased's estate for a tort committed during marriage nor could this be done after a decree of divorce.[110]

The main reform came with the Married Women's Property Act of 1882 which, having recognized the married woman's capacity to acquire and deal with her separate property, made her liable for her ante-nuptial torts to the extent of such property.[111] She could now sue and be sued in tort without joining her husband in the action[112] but "no husband or wife shall be entitled to sue the other for a tort".[113] There followed a series of cases concerning the extent of the husband's liability for his wife's torts during marriage after 1882[114] culminating in the House of Lords' decision of 1925 in Edwards v. Porter that, notwithstanding the 1882 Act, the husband remained liable for the torts of the wife committed during marriage, unless the tort was directly connected with a contract between them and was the means of enforcing it.[115] This decision supported the view that the 1882 Act was a property Act only, concerned with proprietary rather than personal liability and was not concerned with the status of married women as a class. The decision of the House of Lords met with strong opposition on the ground that the 1882 Act had intended to relieve the husband from liability, the common law fiction of legal unity having been dissolved.[116] Many condemnded the Edwards v. Porter interpretation of the 1882 Act as being illogical and unfair; as Winfield said[117] "... The result was that it might well be less expensive for a man to keep a dog with a

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[106] Supra n.20 at 90.

[107] 20 & 21 Vict. c.85 s.26. But the prohibition was reintroduced in 1935.

[108] 33 & 34 Vict. c.93 s.11.

[109] Bromley, Family Law 279 (3rd ed. 1966).

[110] Philips v. Barnet (1875) 1 Q.B.D. 436.

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111. 45 & 46 Vict. c.75 s.13.

112. Id. s.1(2).

113. Id. s.12.

114. Seroka v. Kattenburg (1886) 17 Q.B.D. 177; Cuenod v. Leslie (1909) 1 K.B. 880.

115. (1925) A.C.1.

116. Graveson & Crane, supra n.38 at 93.

117. Textbook of the Law of Tort 124 (6th ed. 1954).

savage temper than to marry a wife with a venomous tongue."

In 1934 a Law Revision Committee was established to examine, inter alia, the husband's liability for his wife's torts and the married woman's liability generally in tort and contract.[118] The recommendations of this Committee were implemented in the Law Reform (Married Women and Tortfeasors) Act of 1935 which, as has been seen, effected reforms in property and contract, as well as tort.[119]

The 1935 Act enabled a married woman to sue and be sued and be liable in tort as if she were a *feme sole*, subject to the provision in the 1882 Act that neither husband nor wife could sue the other in tort.[120] The Act expressly absolved the husband *qua* husband from liability for his wife's torts committed either before or after the marriage.[121] As one writer has said "... in effect Parliament had demanded from the married woman the price of her increased freedom".[122] The husband still could be vicariously liable however, on a principal - agent basis or if the wife were his servant acting in the course of her employment.[123]

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[118] Kahn-Freund, *Inconsistencies & Injustices in the Law of Husband & Wife* (1952) 15 M.L.R. 133.

[119] 25 & 26 Geo.5 c.30.

[120] *Id*. s.1.

[121] *Id*. s.3.

[122] Brown M.,(1936) 14 Can. Bar Rev. 265.

Failure to remove the disability of spouses to sue each other in tort, a remnant of the fiction of legal unity, was found by many to be "distressing and embittering."[124] Kahn-Freund points out that the difficulty with the 1935 Act was not so much that it did not make possible proceedings in tort between spouses, as that it failed to abolish the common law rule against substantive liability.[125] He deplored the consequences whereby a third party suffered because his joint tortfeasor happened to be the spouse of the victim and the substantive rule against tortious liability of spouses prevented the liability being shared.[126] This situation was not remedied until the Law Reform (Husband and Wife) Act of 1962 in England which provided that each spouse should have the same right of action against the other in tort as if they were not married.[127]

d) Criminal Proceedings & Evidence

As has been noted when discussing the common law, spouses could not steal from each other because of the notional unity of possession. With the extension of the concept of separate property, however, it became necessary to modify this rule in order to give property interests the protection of the criminal law. On the other hand, public thinking was not yet prepared to abandon the old rule completely[128] and so a compromise was achieved in the Married Women's Property Act of 1882 which provided that either spouse was capable of stealing the other's property providing they were not living together at the time of prosecution and that they were not living together at the time of the offence, unless committed by one spouse when leaving or deserting the other.[129] The courts subsequently held that the offence could be established without regard to the conditions in the proviso in the absence of evidence by the defence which would establish the defence under the proviso.[130]

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[123] Bromley, supra n.51 at 279.

[124] Winfield 14 Can. Bar Rev. 653.

[125] Supra n.118 at 146.

[126] See Chant v. Read (1939) 2 K.B. 346.

[127] 10 & 11 Eliz.2 c.48 s.1.

Formerly a wife's property was protected against her husband but the reverse situation did not obtain. This situation was remedied by a reciprocal provision in the 1882 Act so that any act of the wife against her husband's property would make her liable to criminal proceedings by her husband.[131]

The above-mentioned provisions were replaced in the Larceny Act of 1916.[132] However, in a subsequent case it was argued that the common law disability of a married woman to steal her husband's goods had been disposed

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128. Bromley, supra n.51 at 283.

129. 45 & 46 Vict. c.75 s.12.

130. R. v. James (1902) 1 K.B. 540.

131. 45 & 46 Vict. c.75 s.16.

132. 6 & 7 Geo.5 c.50 s.36.

of but it was held that the amendment to the law had not been great so that a wife committed no crime when taking the husband's goods unless taken when leaving or deserting.[133]

The common law presumption that a wife committing an offence must have done so under the coercion of her husband was by now incongruous with the married women's comparatively emancipated status. Consequently, the Criminal Justice Act of 1925 abolished this presumption[134] but with the proviso that it should be a good defence for a wife to prove that the offence had been committed in the presence of, and under the coercion of the husband. The burden of proof was thus shifted onto the wife. The scope of this defence appeared to be wider than the presumption it replaced in that the Act appeared to extend it to misdemeanours.[135]

With regard to evidence, as has been seen, at common law a spouse could not give evidence for or against either the other spouse or the other party to an action. The Evidence Amendment Act of 1853, however, enabled a husband or wife of a party to become a permissable witness for the party and also to give evidence for the other side.[136] It was also provided that nothing in the Act should render either spouse competent or compellable to give evidence for or against the other in any criminal proceeding[137] and that neither spouse should be compellable to disclose any communication made one to the other during the marriage.[138] It was held with regard to the latter case that even after divorce the wife could not be compelled to give evidence against her husband concerning what had transpired during the marriage on the ground that there should never be a violation of marital confidence.[139] This appears to have been reversed by a more modern case however.[140] This change in the law paved the way for further changes resulting from greater emancipation for women.[141] The Married Women's Property Act of 1882, having enabled a married woman to sue her husband to protect her separate property, it became necessary to permit her to give evidence against her husband. The 1882 Act therefore provided that"... in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding."[142] Thus the criminal law of evidence was altered as far as proceedings under the 1882 Act were concerned but as regards all other prosecutions the common law

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[133] R. v. Creamer (1919) 1 K.B. 564.

[134] 15 & 16 Geo.5 c.86 s.47.

[135] Mendes Da Costa in Graveson & Crane supra n.38 at 169.

[136] 16 & 17 Vict. c.83 s.1.

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137. Id. s.2

138. Id. s.3.

139. O'Connor v. Marjoribanks (1891) 4 M & Gr. 435.

140. Shenton v. Tyler (1939) 1 All E.R. 827 C.A.

141. Nokes in Graveson & Crane, supra n.38 at 144.

142. 45 & 46 Vict. c.75 s.12.

rule still prevailed.[143] It is to be noted that while the provisions of the 1882 Act made a spouse a competent witness, it did not make a spouse a compellable witness against the other. Furthermore, while the 1882 Act rendered a wife liable to criminal proceedings for acts to her husband's property under the Act,[144] it was subsequently held by the courts that in such an action the husband could not give evidence against the wife.[145] This unjust situation was remedied by the Married Women's Property Act of 1884 which provided that the husband or the wife of the accused should be both competent and compellable witnesses.[146] The Criminal Evidence Act of 1898 then, whether by accident or design, stated that a wife should be only a competent witness for the Crown in prosecutions under the 1882 Act;[147] it made no mention of the 1884 Act which may have been impliedly repealed thereby and so there have been conflicting decisions as to whether a wife is a compellable witness in such circumstances.[148]

With regard to adultery cases, the Evidence Amendment Act of 1853

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143. *Brown*, *supra* n.52 at 92; *Phillips* v. *Barnett* (1876) 1 Q.B.D. 440.

144. 45 & 46 Vict. c.75 s.16.

145. *The Queen* v. *Brittleton* 12 Q.B.D. 266.

146. 47 Vict. c.14 s.1.

147. 61 & 62 Vict. c.36 s.1.

148. *R.* v. *Moore* (1954) 1 W.L.R. 893 at 898; *R* V. *Algar* (1954) 1 Q.B. 279 at 285.

specifically provided that neither spouse was competent or compellable to give evidence against the other.[149] With the establishment of the new Divorce Court in 1857 however, and the need to try matrimonial causes like other actions, the law was changed by the Evidence Further Amendment Act of 1869 so that spouses could witness against each other in proceedings instituted in consequence of adultery.[150] It was never clear whether such evidence was compellable but in 1948 The Court of Appeal decided that it was.[151] The contrary, however, was established by statute the following year.[152]

The general common law rule that a wife could not give evidence against her husband in criminal proceedings gave rise to difficulty when the offence was personal violence by the husband against the wife and it appears that in fact wives were permitted to so testify.[153] The Court of Criminal Appeal declared in 1931, however, that a wife was not only a competent but also a compellable witness in such circumstances.[154]

By the Criminal Evidence Act of 1898 the accused's spouse became a competent witness for the defence but only the accused might call for the spouse's testimony and the rule against disclosure of matrimonial communications was extended to criminal proceedings.[155] Furthermore, after divorce (but not annulment or judicial separation) a spouse was incompetent to testify against the accused concerning matters which occurred during marriage if incompetent to do so while the marriage subsisted.[156]

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[149] 16 & 17 Vict. c.83 s.1.

[150] 32 & 33 Vict. c.69 s.3.

[151] Tilley v. Tilley (1949) P.240.

[152] Matrimonial Causes Act (1950), 14 Geo.6 c.25 s.32.

[153] Nokes, supra n.141 at 147.

[154] R. v. Lapworth (1931) 1 K.B. 117.

e) Matrimonial Relief

The Matrimonial Causes Act of 1857[157] marked the introduction of modern divorce law. The principal cause of reform was the widespread discontent resulting from abuses by the ecclesiastical courts which had jurisdiction over matrimonial and other matters.[158] Another factor was the prohibitive cost of matrimonial relief which barred women in general and all but the most wealthy from acquiring such relief. The intent of the Commission, upon whose findings the 1857 Act was framed, was not to add additional grounds to the existing one of adultery for divorce, but to establish a new tribunal and to legislate upon principles of law which were deemed to exist at that time.[159] And so the old ecclesiastical jurisdiction in matrimonial causes was abolished and new secular courts established. The former jurisdiction of the ecclesiastical courts in respect of divorce a mensa et thoro, of nullity of marriage, of restitution of conjugal rights and of jactitation of marriage, were vested in the new secular Divorce Court;[160] a decree of judicial separation replacing divorce a mensa et thoro.[161] Judicial separation was now obtainable on grounds of adultery or cruelty and on desertion without cause for two or more years.[162]

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[155] 61 & 62 Vict. c.36 ss.1(c), (d).

[156] Bromley, supra n.51 at 285.

[157] 20 & 21 Vict. c.85.

[158] Kitchin, A History of Divorce 182 (1912).

[159] Kitchin, supra at 183.

Dicey's appraisal of the 1857 Act was that it was "a trimuph of individualistic liberalism and of common justice"[163] but this may have been an overly optimistic view. The Act enabled a husband to divorce his wife for adultery and sue the correspondent for damages. The wife, however, could only obtain a divorce where she could prove desertion, cruelty, bigamy or incest in addition to adultery;[164] she had no corresponding action for damages. Attempts to obtain divorce for women on the sole ground of adultery were stoutly resisted both by the Government and the Church.[165]

Amending legislation of a procedural nature followed in subsequent years which ameliorated somewhat the position of the married woman, but her access to the courts was still governed by her financial resources over which, as has been seen, she had little control at this period. A further lack of incentive to seek matrimonial relief lay in the social stigma which attached to divorce at this time, although attitudes gradually relaxed in this respect. As evidence of a growing tendency to equate the position of husband and wife the gradual change in the interpretation of cruelty has been instanced, from the requirement of physical pain to that of mental suffering.[166]

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[160] 20 & 21 Vict. c.85 s.6.

[161] Id. s.7.

[162] Id. s.16.

[163] Supra n.4 at 347.

[164] 20 & 21 Vict. c.85 s.27.

[165] Kitchin, supra n.158 at 185; Davies, Matrimonial Relief in English Law in Graveson and Crane, supra n.38 at 317.

In The Matrimonial Causes Act of 1884[167] the decree of restitution of conjugal rights was given a new significance. Under the jurisdiction of the ecclesiastical courts this was the only remedy for desertion, and disobedience to such a decree was punishable by attachment. The 1884 Act prohibited attachment,[168] enabled the court to order maintenance or settlement of property in favour of the petitioner and children of the marriage,[169] and decreed that failure to comply with an order for restitution of conjugal rights would be tantamount to desertion without reasonable cause and it enabled judicial separation to be granted before the prescribed two year period.[170] The principle use made of this Act was through the provision of desertion in statutory form which enabled a deserted wife, where the husband had also committed adultery, to petition for divorce immediately without waiting for the statutory two-year period

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166. Montmorency, supra n.66 at 192.

167. 47 & 48 Vict. c.68.

168. Id. s.2.

169. Id. s.3.

170. Id. s.5.

to run, providing she had obtained a decree of restitution of conjugal rights.[171]

The inequality which was still evident in matrimonial matters appears to have derived from the presumption that adultery was a more heinous offence in a woman than in a man and so, despite the arguments of the Divorce Royal Commission of 1912 that, "... in principle there can be no adequate reason why two persons, who enter into matrimonial relationship, should have a different standard of morality applied to them",[172] this anomaly regarding adultery in divorce law persisted until 1923. By The Matrimonial Causes Act of that year the spouses were put on an equal footing by enabling the wife to petition for divorce on the ground of adultery simpliciter.[173]

But the need for further reform was much in evidence. It was being realized that desertion for a lengthy term was as disruptive of a home as adultery and that the present law provided no relief for the wife unable to trace her husband and obtain proof of his adultery. Furthermore, while cruelty had long been a ground for judicial separation, incurable insanity presented an aspect of involuntary action for which the current structure of matrimonial relief based on the matrimonial offence provided no recourse.[174]

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[171] Davies, supra n.165 at 318.

[172] Graveson and Crane, supra n.38 at 319.

[173] 13 & 14 Geo.5 c.19 s.1.

[174] Davies, supra n.165 at 320.

The Matrimonial Causes Act of 1937[175] took the above factors into account by providing new grounds for divorce. Either spouse was now permitted to base the petition on the other's cruelty, on desertion for three years or, in certain conditions, supervening incurable insanity.[176] The Act deliberately omitted definitions of these grounds and subsequently the courts, cautiously if not unwillingly, were left to evolve their own definitions. The resultant difficulties, together with more modern legislation will be discussed in a later chapter.

3. CANADIAN LEGISLATION

The laws of Canada, in the common law Provinces, have been based on the laws of England.[177] The British North America Act of 1867 relegated authority on certain matters to the Federal Government and on others to the Provincial Legislatures. Matters coming within the purview of the Provincial Legislatures were those of a local and private nature which included property and civil rights:[178] those within the federal jurisdiction were those not within the provincial jurisdiction and specifically included marriage and divorce.[179]

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[175] 1 Edw. 8 & 1 Geo.6 c.57.

[176] *Id*. s.2

[177] See generally *Ontario Law Reform Commission: Property Subjects* (1967); *Ontario Law Reform Commission Report on Family Property Law* (1974); Auld, *Matrimonial Property Law in the Common Law Provinces of Canada in Friedmann* *supra* n.5 at 239; *Hahlo, supra* n.7 at 465; Bliss *Canadian History in Documents, 1763-1966* (1966); Khetarpal, *supra* n.11 at 39; *Ontario Law Reform Commission: Separation & Divorce Support Obligations* (1969).

[178] British North American Act s.92.

Unlike the United States of America no provisions concerning the rights and liberties of the citizen were incorporated in the Canadian constitution apart from the provision concerning civil rights mentioned above. However, in view of the fact that the Equal Rights Amendment to the American constitution met with such difficulties in obtaining sufficient ratification to bring it into force, it is doubtful whether the status of women in Canada would have been improved by virtue of such a clause in the Canadian constitution.[180]

While the general principles of English matrimonial property law have been adopted by each common law provincial legislature, the various provinces have not followed English precedent entirely and have varied one from the other in the legislation enacted. For example, the concept of the wife's "separate property" was preserved in Ontario, although abandoned in all other provinces, and dower, curtesy and restraints on anticipation still exist in theory in Ontario while in Alberta, Manitoba, Saskatchewan and British Columbia dower and curtesy have been replaced by homestead legislation.[181] However, in the common law provinces a married woman, by

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179. Id. s.91.

180. Labour Canada: Women's Bureau '73 26 (1974).

181. Hahlo, Matrimonial Property Regimes (1973) II Osgoode L.J. 465.

virtue of each province's Married Women's Property Act,[182] has the civil capacity and property rights of a feme sole.[183] Similarly the laws of Canada and the provinces concerning the personal rights of married women, their civil capacity in general and position in criminal law matters, has closely followed the English pattern. These will be discussed in the following chapter.

4. COMMISSIONS ON THE STATUS OF WOMEN

a) The United Nations

The United Nations has always been committed to the principle of equality between men and women and as a move towards this goal in 1946 it set up a Commission on the Status of Woman. One of the chief concerns of this Commission was the legal status of married women and at an early session it recommended as a prime objective "full equality of all civil rights, irrespective of nationality, race language or religion, including among others:[184]

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[182] Married Women's Property Act R.S.P.E.I. 1951 c.92.
Married Women's Property Act R.S.N.S. 1952 c.168.
Married Women's Property Act R.S.Nfld. 1952 c.143.
Married Women's Property Act R.S.N.B. 1952 c.140.
Married Women's Property Act R.S.A. 1953 c.193.
Married Women's Property Act R.S.M. 1954 c.156.
Married Women's Property Act R.S.B.C. 1960 c.233.
Married Women's Property Act R.S.O. 1960 c.229.
Married Women's Property Act R.S.S. 1965 c.340.

[183] Khetarpal, supra n.11 at 44.

1. Marriage. Freedom of choice, dignity of the wife, monogamy, equal right to dissolution of marriage.
2. Guardianship. Equal rights to guardianship of her own and of children.
3. Nationality. Right to keep her own nationality, and the right of children to choose the nationality of the mother upon their attaining the age of majority.
4. Legal Capacity. Equal right to enter into contracts and to acquire and dispose of inherited property.
5. Domicile. A married woman to have the same right to establish domicile as a man or a single woman.

Consequently, in 1955 the Secretary-General of the United Nations was requested by the Commission to prepare a report on the legal status of married women. This Report noted that in a large number of countries marriage had the effect of depriving a woman of a number of important personal and property rights due to the fact that the husband was traditionally considered the head of the family, vested with complete authority over wife, children and property. The Report also noted that while, in the last ten years, women had acquired more rights and independence, "the root of discrimination against women in private law still lies in the subordinate status of married women."[185] Pertinent resolutions subsequently adopted by the United Nations were:[186]

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[184] U.N. Commission on Status of Women: Legal Status of Married Women 1 (1975).

[185] Supra at 3.

[186] U.N. General Assembly Resolutions (1957) 503D (XVI), 547 I·(XVIII).

> 1. That all possible measures be taken to ensure equality of rights and duties of husband and wife in family matters.
>
> 2. That Member States take all necessary steps to eliminate such discriminatory provisions (depriving the wife during marriage of her property rights) from their legislation....

Recognizing the subordinate, restricted and totally unequal role that women have been required by society to play down through the centuries - particularly in the more backward countries - a long-term United Nations program was instituted in 1962 for the advancement of women in general.[187] The basic objectives of the program were;

> a) To promote the universal recognition of the dignity and worth of the human person and of the equal rights of men and women in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights.
>
> b) To enable women to participate fully in the development of society in order that society may benefit from the contribution of all its members.
>
> c) To stimulate an awareness among both men and women of women's full potential and of the importance of their contribution to the development of society.

The Committee on the Status of Women has endeavoured to promote international legal standards through various instruments adopted by the United Nation's General Assembly such as the Declaration of the Elimination of Discrimination against Women (1967). The Committee on the Status of Women has found that while many countries today pay lip service to the principle of equality, implementation is quite another matter and so it works to ensure that women are given the opportunity to exercise the rights they may have acquired on paper. The Commission places great emphasis in the need for equal access by men and women to education, science and culture.

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[187] See generally World Peace Through Law Center: The Law and Women (1975).

The United Nations proclaimed 1975 "International Women's Year" one of the chief objectives being:[188]

> "to ensure the full integration of Women in the total development effort, especially by emphasizing women's responsibility and important role in economic, social and cultural development at the national, regional and international levels, particularly the Second United Nations Development Decade."

The highlight of the International Women's Year was the World Conference the two major objectives of which were:[189]

> 1. To arouse the consciousness of the world to the need to promote equality between men and women and to the vital contribution women make - or can or should make - to the total development effort and to world peace:
>
> 2. To launch a dynamic plan of action to improve the conditions of women and to increase their contribution to society.

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[188] Supra at 22.

[189] Supra n.187 at 23.

The outcome of the International Women's Year has been a World Plan of Action to stimulate national and international action. At the end of the first five year period the Plan calls for:[190]

a) A marked increase in literacy of women;

b) Extension of vocational training in basic skills; including moder farming methods;

c) Parity of enrollment at the primary level of education;

d) Increased employment opportunities for women;

e) Establishment of infrastructural services in rural areas;

f) Enactment of legislation on voting and eligibility for election, on equal pay, and on equal legal rights; and

g) Increased participation of women in policy-making positions, at the local, national, and international levels.

It remains to be seen the extent to which this Plan will be translated into action.

b) *Great Britain*

In Great Britain a Law Commission was established in 1965 to examine a comprehensive range of matters with a view to reform. While the legal status of married women was not a specific topic for investigation, the rights and obligations of the married woman came under scrutiny in the project titled *Family Law, and Miscellaneous Matters involving Anomalies, Obsolescent Principles or Archaic Procedures*.[191] This study then led to various proposals for change.

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[190] *Supra* n.187 at 24.

[191] *Law Commission First Annual Report: 1965-66* (1966).

c) Canada

The Canadian Government set up a Royal Commission on the Status of Women in Canada in 1967. The Report of this Commission recommended, inter alia, that those provinces and territories which had not already done so should amend their law in order to recognize the concept of equal partnership in marriage.[192] Following this Report, the Prime Minister of Canada stated that the status of women would receive priority consideration by his Government and he pledged its support for the removal of discrimination and the provision of equal opportunities for women in all fields of Canadian life. A Government Inter-Departmental Committee was then set up to examine the recommendations directed to the Federal Government by the Royal Commission Report: The first Report of this Committee was forthcoming in 1972.[193] In addition, an advisory Council on the Status of Women was established by the Federal Government in 1973.

Meanwhile, in 1968 the Canadian Bar Association recommended the establishment of a Law Reform Commission in any jusridiction in which there was none. At that time there were two Law Reform bodies in Canada: the Alberta Institute of Law Research and Reform and the Ontario Law Reform Commission both of which have produced considerable material on reform which involves the status of married woman. There are now in addition Law Reform bodies at work in British Columbia, Manitoba, Prince Edward Island, Nova Scotia and New Brunswick.

The recommendations of the law reform bodies will be discussed, where applicable, in the chapters which follow.

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[192] Report of the Royal Commission on the Status of Women in Canada 410 (1970).

[193] Status of Women in Canada - 1972.

A. PERSONAL RIGHTS

1. INTRODUCTION

As has been seen from the previous chapters, husband and wife were deemed to be one person at common law and the rights of the wife were subjugated to those of her husband. But with the statutory reform of the Married Women's Property Acts in England and Canada married women at last became separate persons with their own rights and liabilities. The personal and civil rights of the married woman today will now be examined.

2. NAME

In early times there was a lack of concern over surnames which resulted in the common law principle that a married woman could change her surname at will without legal formality, but gradually families were encouraged to identify themselves under one name for record-keeping purposes.[1] In keeping with the common law principle that a married woman had no legal existence apart from her husband, the custom emerged that the wife should adopt her husband's surname on marriage[2] and, on formal social occasions, his christian name or initials as well.[3]

The modern view[4] in both England and Canada[5] is that the adoption by a woman on marriage of her husband's surname is still a matter of custom rather than of law[6] so that a married woman has the right to choose and use the name by which she will be known[7] provided that a name may not be adopted for fraudulent purposes[8] or in order to deceive.[9]

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[1] Bysiewicz and MacDonnell, Married Women's Surnames (1973) 5 Conn. L. Rev. 599.

[2] The Right of a Married Woman to Use her Birth-Given Surname for Voter Registration (1972) 32 M. L. R. 409.

[3] Stone, The Status of Women in Great Britain (1972) 20 Am. J. Comp. L. 606.

[4] See generally Kanowitz, Woman and the Law 41 (2nd ed. 1970); Turner-Samuels, The Law of Married Women 345(1957); Conservative Political Centre: Fair Shares for the Fair Sex 20 (1969); Josling, Change of Name (9th ed. 1970); Royal Commission on Status of Women in Canada 235 (1970); Bromley, Family Law 95 (4th ed. 1971); Rothschild, The Right to Change One's Name (1965) 5 J. Fam. L. 220; Daum, The Right of Married Women to Assert their own Surnames (1974) 8 U. Mich. J. L. Reform 64; Stannard, Married Women v. Husbands' Names (1973).

[5] In the U.S.A. a change of name on marriage appears to be generally required in law although only in Hawaii is there express statutory provision; Kanowitz, supra n. 4. For position in U.S.A. see Spencer, A Woman's Right to her Name (1973/74) 21 U.C.L.A. Law Rev.; Daum, supra n. 4.

[6] Re Fry (19450 Ch. 348.

Despite the absence of legal authority, it is tacitly implied in some legislation and administrative practices that a married woman's official name is that of her husband[10] and the obstacles in the path of any married woman who attempts to assert to the contrary are considerable.[11] However, refusal of a married woman to adopt her husband's name will not prejudice either her succession or her contractual rights.[12]

Provisions now exist in both England[13] and Canada[14] for effecting a formal change of name. Usually[15] a married woman may not apply to have

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7. Dancer v. Dancer (1949) P. 147; Chipchase v. Chipchase (1939) 3 All E.R. 895.

8. Du Boulay v. Du Boulay (1869) L. R. 2 P. C. 430: Cowley v. Cowley (1901) A.C. 450. See National Insurance Decision R(G) 1/68 cited in Josling, supra n.4 at 34.

9. Bromley, supra n.4; Du Boulay v. Du Boulay and Cowley v. Cowley supra n.8.

10. Royal Commission, supra n.4; Josling, supra n.4 at 35; Stuart v. Board of Supervisors of Elections (1972) 266 Md. 440, 295 A. 2d. 223.

11. New Brunswick Human Rights Commission: Women and the Law in New Brunswick 5 (1973).

12. Turner-Samuels, supra n.4.

13. Enrolment of Deeds (Change of Name) Regulations 1949 [S.I. 1949 No. 316 (L.3)].

14. Change of Name Acts as amended: R.S.O. (1970) c.60; R.S.B.C. (1960) c.50; S.M. (1971) c.69; S.A. (1973) c.63; R.S.P.E.I. (1951) c.22; R.S.S. (1965) c.408; R.S.N.B. (1955) c.5; R.S.N. (1970) c.33; R.S.N.S. (1967) c.30.

15. In Alberta, Manitoba and Ontario amending legislation has substituted "married Person" or "spouse" for husband and wife thus placing the latter on an equal footing with the former.

her name changed but the husband may make such application with his wife's consent.

With regard to a mother's right over her child's name after separation or divorce, it has been held that a custody order in favour of a wife does not give her the right to change the hereditary patronymic surname of a child of the marriage by deliberate act against the father's wishes.[16]

Concerning a married woman's name on her passport, the Canadian Federal Minister of Labour has declared that passports, being basically identity documents, are issued in whatever name the applicant uses in the community.[17] However, if a woman continues to be known by her maiden name after marriage, it appears that her passport will cease to be valid until her new status and married name are endorsed thereon.[18]

The custom that a woman on marriage shall adopt her husband's surname is now under attack on the ground that it is "harmful to a woman's self-development"[19] and there are indications of concern over present practices in this regard. The Report of the Royal Commission on the Status of Women in Canada has recommended that federal policy be changed

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16. Re T (otherwise H) (an infant) (1963) Ch. 238 where a declaration was granted that a deed poll executed on an infant's behalf by its mother, the legal guardian, was ineffective to change its name to the mother's new married name.

17. Munro, Status of Women in Canada 1973 31 (1973).

18. Report of the Royal Commission, supra n.4.

19. Kanowitz, supra n.4; Kanowitz, Sex Roles in Law and Society 192 (1973). For argument in favour of the custom see Rothschild, supra n.4 at 223.

so that a woman need not apply for a new passport on marriage unless she wishes to use her husband's surname.[20] Meanwhile the Ontario Law Reform Commission is reviewing the Ontario Change of Name Act with a view to ascertaining its effect on the right of a married woman to use her maiden name during marriage, upon separation or after divorce.[21]

At common law a married woman may still use her maiden name for bona fide purposes and so the question arises as to whether there should be legislation to accord legal recognition to informal name changes. It is not clear, in those provinces which enable a married woman to apply for a change of name, whether or not she may apply in respect of her maiden name.

It is submitted that, in conformity with the steps taken in other areas to release married women from dependence on their husbands, statutory provision should be made to enable a woman elect as to her surname either on, during or after marriage. It may be pointed out that in Singapore under the Women's Charter the wife has been given the right to use her own surname and name separately.[22] Furthermore, it is submitted that a woman's passport should not cease to be valid upon marriage and that if she should choose to adopt her husband's surname, a mere endorsation thereof should be all that is required.

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20. Supra n. 4 at 235.

21. 7th Annual Report 13 (1973).

22. (1961) C. 47 s.45(2).

3. NATIONALITY

It would appear that the doctrine of unity of husband and wife had no application at common law with regard to nationality in that an alien woman did not acquire British nationality by marrying a British subject and a female British subject did not lose her British status by marrying a foreigner,[23] but this view is not without opponents.[24] The 19th Century saw a reversal of this position when a woman automatically acquired her husband's nationality on marriage and lost her British nationality if she married an alien and acquired his nationality.[25]

The modern position shows a swing back to the common law view so that there is no longer an automatic change in nationality status when a woman marries. Present law in England is governed by the British Nationality Act of 1948[26] which created a new status of citizen of the United Kingdom and Colonies.[27] Since the passing of this Act, an alien woman does not become a citizen of the United Kingdom by marrying one,[28] nor does a female United Kingdom citizen lose her citizenship by marrying an alien. With regard to married women who had undergone a change of nationality on marriage under the previous law, the 1948 Act preserved the British nationality of those who had acquired it by marriage and revested it in those who had lost it on marriage to an alien.[29] Where a married woman acquires an alien husband's nationality in addition to her British nationality, she may renounce the latter if she so wishes.

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[23] *Bromley*, *supra* n.4 at 285.

[24] Baty, *The Nationality of a Married Woman at Common Law*, (1936) 52 L.Q.R. 247 "When we consider the enormous power with which a husband is invested over his wife by the Common Law, it seems monstrous that she could ever conceivably be thought subject to a competing control exercised by an alien power."

[25] Schmitthoff, *Nationality of Married Women*, (1946) 13 Sol. 178.

[26] 11 & 12 Geo.6 c.56 and ss.6,19.

[27] See Generally *Bromley*, *supra*, n.4 at 130; *Turner-Samuels*, *supra* n.4 at 404; *Schmitthoff*, *supra* n.25; *United Nations Department of Economic and Social Affairs: Nationality of Married Women*, (1963); Kenyon, *Some Problems in the Nationality of Married Women*, (1947-48) 33-34 Women Lawyers' J.3; *Report of Royal Commission*, *supra* n.4 at 362; *Women's Cultural and Information Bureau: Laws of Interest to Women in Alberta* 6 (1968).

The British North American Act gave the Dominion exclusive legislative authority with regard to "naturalization and aliens"[30] and concurrent but overriding authority concerning immigration,[31] but nowhere was there specific reference to citizenship or nationality. After the Statute of Westminister in 1931 it became possible to deal with Canadian citizenship as opposed to British nationality[32] and so the first Canadian Citizenship Act was passed in 1946[33] in which sex and marital status were generally irrelevant. But whereas in England those women who had married aliens before 1946, and thereby lost their British status, were deemed to have retained it on the passing of the 1946 Act, this was not so under Canadian legislation; a Canadian woman who had married an alien prior to 1946 has to make special application to the Secretary of State at whose discretion her Canadian nationality may be restored.[34]

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[28] An alien woman marrying a U.K. citizen may acquire citizenship by registration, but the approval of the Home Secretary is required if she had previously renounced or been deprived of U.K. citizenship, (British Nationality Act 1965 c.34 ss. 1-3).

[29] 11 & 12 Geo.6 c.56 ss. 12(5), 14.

[30] (1867) 40 & 41 Vict. c.3 s.91(25).

[31] Id. s.95.

[32] Laskin's Canadian Constitutional Law, 863 (4th ed. 1973).

[33] Now the Canadian Citizenship Act. R.S.C. (1970) c.C-19. See Tamaki, The Canadian Citizenship Act 1946, (1947) 7 U.T.L.J.68.

In both England and Canada the citizenship of the mother appears to be of lesser importance than that of the father in that a child automatically inherits his father's nationality. Thus a child born in England of an English mother and a Canadian father will be a natural born Canadian citizen and a child born in Canada of a Canadian mother and an English father will have English nationality. Furthermore, a child still retains his father's nationality after the parents have separated and the child lives with the mother in her country of origin.[35] Not only can a mother not confer citizenship on her child, she cannot apply for naturalized citizenship for it in Canada where neither parents nor child were born Canadians; such an application can only be made by the "responsible parent", a phrase normally interpreted to mean the father.[36]

The North American Indian married woman is subject to a special kind of discrimination under the Indian Act[37] in that an Indian man marrying a non-Indian woman retains his status whereas in the reverse situation the woman loses her Indian status and all the concomitant rights and privileges of the Indian as do her children.[38] Between 1958 and 1968, 4,605 Indian women were automatically removed from the Indian Registry following marriage to non-Indians.[39]

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[34] Report of the Royal Commission, supra n.4 at 362.

[35] Supra at 363; Conservative Political Centre, supra n.4 at 19.

[36] Supra n.34 at 363. The same principles apply with regard to the nationality of an adopted child.

[37] R.S.C. (1970) c.1-6 s.12(1)(b).

In summary, the modern view in England and Canada is that marriage pertains to civil status only and does not affect the political status of the married woman[40] although difficulty still arises when a British or Canadian woman marries a national of a country adhering to the principle of unity of nationality of spouses.[41] England and Canada have therefore, on the whole, complied with the United Nations requirement on nationality which was:[42]

> Women shall have the same rights as men to acquire change or retain their nationality. Marriage to an alien shall not automatically affect the nationality of the wife either by rendering her stateless or by forcing upon her the nationality of her husband.

However, it is submitted that the spirit of the United Nations document has not been fully implemented and it is recommended: firstly, that there be automatic resumption of Canadian citizenship by women who lost it through marriage to aliens before January 1, 1947;[43] secondly, that where the nationality of parents is different, the child, natural or adopted, shall inherit dual nationality thus giving equal emphasis to the ethnic character of both;[44] thirdly, that either parent be enabled to apply for naturalized citizenship for its child.

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[38] See Attorney General of Canada v. Lavell (1974) 38 D.L.R. (3rd) 481 where it was unsuccessfully contended that s.12(1)(b) of the Indian Act was rendered inoperative by s.1(b) of the Canadian Bill of Rights 1960 (Can.) c.44, as denying equality before the law.

[39] Report of the Royal Commission, supra n.4 at 237.

[40] Schmitthoff, supra n.25

[41] Kenyon, supra n.27.

[42] New Brunswick Human Rights Commission: Basic United Nations' Human Rights Documents 13 (1973).

The Royal Commission on the Status of Women in Canada has made recommendations similar to the above but despite assurances by the Federal Government that these matters will be "sympathetically considered", the required amendments to the Citizenship Act have not been forthcoming.[45] It is advocated that the Federal Government be asked to fulfill its promise in this regard in the near future.

Finally it is recommended that the Indian Act be amended to enable the Indian woman who married a non-Indian to retain her Indian status.

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43. This would bring Canada into line with Britain in this respect.

44. The English Conservative Political Centre has advocated that a child should have the same right to his mother's nationality as to his father's, but he should be required to elect one or the other on attainment of legal majority; Fair Shares for the Fair Sex, supra n.4 at 19.

45. The Advisory Council on the Status of Women: What's Been Done? 25 (1974).

4. DOMICILE

a) Unity of Domicile

It is commonly assumed that the English common law principle of unity of domicile, whereby a woman automatically acquired the domicile of her husband on marriage, was based on the legal doctrine of unity of spouses and the duty of the wife to adhere to her husband[46], so that it was impossible for a married woman to have a separate domicile.[47] However, some argue that the real foundation of the rule was the mutual duty to cohabit and that only in this light is the unity of domicile rule reasonable,[48] while others claim it is purely a matter of public policy.[49]

Formerly when a woman married and acquired her husband's domicile, she retained it after divorce,[50] after judicial separation,[51] when living apart by agreement[52] or until a voidable marriage was annulled.[53] After divorce or her husband's death however she could take steps to acquire a new domicile.[54] As Graveson commented, it seems incongruous that this aspect of unity of husband and wife should have projected beyond the end of marriage.[55]

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[46] *Dolphin* v. *Robins* (1859) 7 H.L.C. 390.

[47] *Lord Advocate* v. *Jaffrey* (1921) 1.A.C. 146.

[48] Bartholomew, *Domicil of Married Women*, (1958) 31 Aust. L.J. 878.

[49] *Kanowitz*, *supra* n.4 at 49. See generally *Dicey's Conflict of Laws* 113 (7th ed. Morris 1958); *Bromley*, *supra* n.4 at 13; *Turner-Samuels*, *supra* n.4 at 413; Graveson, *The Conflict of Laws* 85 (2d ed. 1952); *Royal Commission on Status of Women in Canada*, *supra* n.4 at 236; *United Nations Commission on Status of Women: Legal Status of Married Women* 8 (1958); Mendes da Costa, *Divorce and the Conflict of Laws in 2 Studies in Canadian Family Law* 902 (1972); *Conservative Political Centre*, *supra* n.4 at 18; *Stone*, *supra* n.3 at 607.

[50] *Turner-Samuels*, *supra* n.4 at 414.

[51] *Attorney-General for Alberta* v. *Cook* (1926) A.C. 444 (P.C.)

[52] *Dolphin* v. *Robins*, *supra* n.46.

[53] *De Reneville* v. *De Reneville* (1948) 1 All E.R. 56 (C.A.)

b) The Importance of Domicile

The importance of the legal concept of domicile of a married woman derived in the main from the fact that in a number of legal systems the place of domicile determined the jurisdiction of courts in matrimonial matters.[56] Thus, at common law, the English courts had jurisdiction in divorce or nullity only where the husband (and therefore his wife) was domiciled in England but considerable statutory reform in this regard has taken place, as shall be seen later.[57]

Domicile is also of importance in succession, for example, where a widow dies intestate.[58] Again, whether a marriage has the effect of revoking a will made by either party prior to the marriage, it is the lex domicilii of the husband at the time of marriage which is the deciding factor.[59] In Canada the provinces have, in general, enacted that a will outside the province will be deemed to have been duly probated if executed according to the law of the testator's domicile when made or his domicile of origin or law of place where made.[60] Concerning movable estate, the will is normally construed and administered according to the testator's domicile at death.[61] A change of domicile after the will has been made will not affect the will.[62]

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[54] Turner-Samuels, supra n.4 at 414.

[55] Reform of the Law of Domicile, (1954) 70 L.Q.R. 492.

[56] United Nations Commission on the Status of Women, supra n.49.

[57] Infra Chapter Seven.

[58] Re Wallach (deceased) (1950) 1 All E.R. 199.

[59] Turner-Samuels, supra n.4 at 425.

Domicile is also of importance to the woman with children in that the domicile of a legitimate infant has always followed that of the father while the domicile of an illegitimate infant followed that of the mother.[63] When the father of a legitimate child died, the mother did not automatically acquire the right to change the domicile of the infant to her own, but she could do so if for the child's benefit[64] and even if she had remarried.[65]

c) The Need for Reform

The rule that a wife could have no domicile other than that of her husband has been the subject of considerable scathing comment. Lord Denning

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60. R.S.O. (1960) c.433; R.S.B.C. (1960) c.408; R.S.A. (1955) c.369 as amended; R.S.S. (1965) c. 127; S.M. (1964) c.57; R.S.N.S. (1954) c.315; R.S.N. (1952) c.147.

61. Angers, Digest of Canadian Law 395 (19th ed. 1967)

62. Supra, at 396.

63. Turner-Samuels, supra n.4 at 414.

64. Potinger v. Wightman (1817) 3 Mer.67

65. Angers, supra n.61 at 397.

had described it as a "barbarous relic of the wife's servitude"[66] and others as "a clear example of discrimination and (which) produces some absurdities".[67]

In 1958 the United Nations Commission on the Status of Women declared that a situation where a woman must acquire the husband's domicile on marriage was incompatible with the principle of equality of spouses during the marriage as proclaimed by the Universal Declaration of Human Rights. The Commission recommended that governments take the necessary measures to ensure the right of a married woman to an independent domicile.[68]

Perpetuation of the unity of domicile theory has been critized in many quarters as being specious and unrealistic in light of modern day sociological and legal conditions.[69] Indeed, the whole domiciliary theory of jurisdiction in divorce has been questioned as being unsound in that migratory ex parte divorces based thereon are inconclusive and unreliable.[70]

It is argued in general that where unity has been destroyed and the duty to cohabit no longer exists, there is no longer any valid ground for withholding the right of a married woman to a separate domicile.[71]

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66. Margaret Puxon citing Lord Denning, Death of a Fiction, (1962) 106 Sol.J. 742.

67. Conservative Political Centre, supra n.4 at 19.

68. Supra n.49 at 99.

69. Kanowitz, supra n.49 at 50.

70. Stinson, The Unsoundness of the Domiciliary Theory (1956) 42 Am Bar Ass. J.223.

71. Bartholomew, supra n.48 at 99.

d) Reform in England

The first important deviation from the unity of domicile principle took place when the courts' jurisdiction was extended to enable a wife petition for matrimonial relief whose husband, having been domiciled in England, had been deported, or had abjured the realm and the wife had resided in England for three years prior to her petition.[72] The courts then felt obliged to recognize a foreign court's jurisdiction mutatis mutandis.[73] With regard to proceedings for a decree of presumption of death and dissolution of marriage, if brought by the husband he had to be domiciled in England but if brought by the wife domicile or residence for three years would suffice to give the court jurisdiction and in determining the wife's domicile the husband was deemed to have died immediately after she last heard of him alive.[74]

Concerning foreign decrees of nullity, where the marriage was void, such a decree was recognized in England if both parties had been domiciled in the foreign jurisdiction.[75] Where the marriage was voidable, the decree would be a judgment in rem which altered the status of the parties and could therefore only be pronounced by the court of their domicile.[76]

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[72] Matrimonial Causes Act (1965) c.72 s.40 (1)

[73] Indyka v. Indyka (1967) 2 All E.R. 689 (H.L.).

[74] Matrimonial Causes Act. (1965) ss. 14(2), 14(5).

[75] But if the wife's acquisition of the foreign domicile depended solely on the marriage which had been decreed a nullity, the decree would not be recognized.

[76] Turner-Samuels, supra n.4 at 420.

After study, the Private International Law Commission in 1963 recommended no change in the rules regarding a married woman's domicile, save in cases of separation by court order. The Royal Commission on Marriage and Divorce thereupon concluded that it was preferable to have a simple rule without exception and it saw no reason why the law should be changed except that a separated wife should be deemed to have a separate domicile for the purpose of taking matrimonial proceedings.[77] After further deliberation however the Law Commission later recommended that for the purpose of jurisdiction in divorce, nullity of marriage and judicial separation, the domicile of a married woman should be determined independently of that of her husband. It is also recommended that English courts should have jurisdiction in divorce, nullity (whether for void or voidable marriage) or judicial separation if either petitioner or respondent was domiciled in England at the commencement of the proceedings.[78]

These recommendations led to the Domicile and Matrimonial Proceedings Act which came into effect on January 1, 1974 in England. It declared that the domicile of a wife shall no longer be that of her husband merely because she is married to him: her domicile will be decided on the facts as in the case of a man or unmarried woman.[79] The Act provides that domicile and residence shall be the only grounds of jurisdiction in proceedings for divorce, nullity, judicial separation or presumption of death and dissolution of marriage.[80] The law relating to recognition of foreign decrees was amended to conform with the new law. Thus a foreign divorce or legal separation will be recognized if one spouse was domiciled in the country where granted and the other in a country where it is recognized or, if the decree is recognized by the lex domicilii of each spouse.[81] Concerning the domicile of a child, it still follows that of the father but if the parents are living apart, and if the child has his home with the mother and no home with the father, his domicile will be that of his mother.[82] The new law has thus "unified and simplified the grounds of jurisidiction over the main matrimonial causes on principles which are, on the whole, both rational and convenient."[83]

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[77] Seventh Report, (1955) Cmnd. No. 30517 at 13. For criticism of the English view see Graveson, Reform of the Law of Domicile, (1954) 70 L.Q.R. 492.

[78] Report on Jurisdiction in Matrimonial Causes (1972) Law Com. No. 48.

[79] Domicile and Matrimonial Proceedings Act (1973) c.45 s.1.

e) Reform in Canada

In Canada matrimonial matters other than divorce are governed by provincial legislation. Formerly the situation in general was similar to that which obtained in England prior to the abolition of the wife's dependent domicile. Then national rather than provincial domicile was established as the basis of jurisdiction in divorce by the Divorce Act of 1970.[84] This Act marked a major breach in the unity of domicile principle in Canada by providing that for jurisdictional purposes under the Act "the domicile of a married woman should be determined if she were unmarried and, if she was a minor, as if she had attained her majority."[85] This section effected a jurisdictional device quite different from that adopted in England, its effect being to confer on a wife the capacity to acquire a domicile separate from that of her husband.[86] While this Act preserved the common law rules regulating recognition of foreign divorce decrees, it provided for recognition of foreign jurisdiction mutatis mutandis in conformity with the new legislation.[87]

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[80] Id. s.5 (1-5). In divorce, nullity or judicial separation it suffices if either party comes within either ground and in presumption of death and dissolution, the petitioner must come within either ground.

[81] Id. s.2.

[82] Id. s.4.

[83] Hartley and Karsten, Statutes, (1974) 37 M.L.R. 182. The authors also note that a wife who fails to satisfy either of the jurisdictional requirements can be disadvantaged.

[84] R.S.C. C. D-8 s.5.

In Alberta domicile of the parties is one of the grounds upon which a court may claim jurisdiction to hear actions for judicial separation or restitution of conjugal rights.[88] After a judgment of judicial separation in Alberta a woman may acquire a new domicile distinct from that of her husband[89] but Alberta is the only common law province where this situation obtains.[90]

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[85] Id. s.6(1).

[86] Mendes da Costa, supra n.47 at 922.

[87] Divorce Act (1970) R.S.C. C. D-8 s. 6(2). For an expansion on this aspect see Swan, A New Approach to Marriage and Divorce in the Conflict of Law, (1974) 24 U.T.L.J. 42.

[88] Domestic Relations Act. R.S.A. (1955) c.89 s.1.

[89] Id. s.11(b)

[90] Royal Commission on Status of Women in Canada, supra n.4 at 236. See also Kanowitz, supra n.4 at 48. where noted that in all States of the U.S.A. married women have an independent domicile for the purpose of instituting divorce proceedings; some have such if living apart for cause, while a few have independent domicile for all purposes.

The Royal Commission on the Status of Women in Canada has recommended that provinces and territories amend their legislation to enable a woman on marriage to retain her domicile or, subsequently, acquire a new domicile independent of that of her husband.[91]

It now remains for Canada to take the final step to enable a married woman acquire a domicile of her own, for any purpose, if she so desires. It is therefore submitted that, in view of the desirability of national uniformity, and in view of the authority given to the Federal Parliament to legislate on matters of marriage and divorce, the Federal Parliament should legislate an end to the concept of dependent domicile and provide that the domicile of a married woman shall no longer be that of her husband by virtue solely of the marriage.

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[91] Supra, n.4 at 237.

B. CIVIL RIGHTS

1. CONTRACT

a) Unity and Contractual Capacity

As has been seen,[92] the Law Reform (Married Women and Tortfeasors) Act of 1935 ended a married woman's merely proprietary contractual liability and enabled her to sue and be personally sued on her contracts as if a *feme sole*.[93] She could therefore be adjudged bankrupt or committed to prison for non-payment of judgment debts.[94] But the principle of legal unity of spouses dies hard, as was demonstrated in the case of *Sutherland v. Barclay's Bank Ltd.*[95] where the wife sued the Bank for breach of contract, the latter having disclosed details of her account to the husband. The wife was unsuccessful on the ground that the husband was deemed to be the wife's advisor and protector and entitled to the information.

b) Ante-Nuptial Agreements

The Law Reform (Married Women and Tortfeasors) Act also brought to an end the husband's liability, *qua* husband, for his wife's ante-nuptial debts[96] but it did not deal specifically with ante-nuptial contracts between husband and wife. The Married Women's Property Act of 1882 had given the wife a limited right to sue the husband[97] but the decision in Butler v. Butler was that the reverse situation did not obtain.[98] It is argued that the rule in Butler v. Butler stands, for if the intent had been otherwise, specific words to this end would have been incorporated in the 1935 Act. But the contrary is also argued on the ground that the whole tenor of the 1935 Act was to place husband and wife on an equal footing.[99] It apears that this point has not yet been put to the test.[100]

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[92] *Supra*, Chapter Two.

[93] 25 & 26 Geo.5 c.30 s.1.

[94] See generally 1 *Chitty on Contracts* 424 (22d. ed. 1961); *Turner-Samuels*, *supra* n.4 at 264; *Cheshire and Fifoot's Law of Contract* 423 (8th ed. 1972); *Bromley*, *supra* n.4 at 120; *Snell's Equity* 518 (27 ed. Megarry and Baker 1973); Morrison, *Graveson and Crane (ed) A Century of Family Law* 116 (1957).

[95] (1938) L.T. Journal 398.

c) The Wife as the Husband's Agent

The 1935 Act only applied to contracts made by a married woman as principal and did not alter the common law presumption that the state of marriage coupled with cohabitation enabled a married woman to contract as her husband's agent.[101] Thus it was established in Debenham v. Mellon[102] that where a wife cohabits with her husband there is a presumption that she, regardless of her conduct, has his authority to pledge his credit for household goods[103] and services. But as Lord Selborne noted, neither cohabitation[105] nor marriage[106] confers a mandate on a wife to pledge her husband's credit; "it is not a status or a new contract."[104] Lord Selbourne pointed out further that unlike the deserted wife's agency of necessity, the agency of a co-habiting wife is not a presumption of law but a rebuttable[107] presumption of fact which persists until facts show otherwise.[108]

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[96] 25 & 26 Geo.5 c.30 s.4(2)(b).

[97] 45 & 46 Vict. c.75 s.13.

[98] (1885) 16 Q.B.D. 374.

[99] Kahn-Freund. Inconsistencies and Injustices in Law of Husband and Wife, (1952) 15 M.L.R. 133 at 140; Cheshire, supra n.90 at 96, 432.

[100] Cf. Re Kendrew (1953) 1 All E.R. 551.

[101] Turner-Samuels, supra n.4 at 267.

[102] (1880) 6 App. Cas. 24 (H.L.).

The presumption that a wife may pledge her husband's credit for household goods may be rebutted by showing that the husband had forbidden the creditor to extend credit to his wife;[109] that the wife had been provided with an adequate allowance with which to pay;[110] that either the wife contracted on her own behalf or the creditor elected to deal with her as principal.[111] Where the husband has forbidden the wife to pledge his credit, her authority is withdrawn even although the creditor knew not of her lack thereof.[112]

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[103] Such were not restricted to purchases e.g. a wife might acknowledge a debt as agent of her husband, thus taking it out of the Statute of Limitations, Gregory v. Parker (1808) 1 Comp. 394.

[104] (1880) 6 App. Cas.31.

[105] E.g. where husband and wife worked together in a hotel as in Debenham v. Mellon supra n.102.

[106] Ryan v. Sams (1848) 12 Q.B. 460 where the presumption applied concerning a mistress; Morrison, supra n.94 at 127 where it is claimed the presumption will apply to a housekeeper.

[107] Miss Gray v. Earl of Cathcart (1922) 38 T.L.R. 562.

[108] Debenham v. Mellon, supra n.102 at 32.

[109] Edwards v. Porter (1925) A.C. 21.

[110] Slater v. Parker (1908) 24 T.L.R. 621.

From the creditor's point of view, he must rely on the presumption of the wife's agency and if the husband can rebut the presumption, the wife will be personally liable on her implied warranty of authority to bind him.[113] If, however, the husband conducts himself so as to cause the creditor to believe the wife has authority, he will be estopped from denying it.[114] The creditor to whom the wife has been held out as agent is not only unaffected by any revocation of authority by the husband of which he knew not, but is also unaffected by termination of authority in the event of the wife's adultery, or separation, or of the husband's bankruptcy or insanity, of which he had no notice.[115]

Where husband and wife have ceased to cohabit, whether or not the wife may pledge his credit depends on the circumstances. The wife has no authority where living apart voluntarily or under a decree of judicial separation, but where the payment of maintenance[116] or alimony[117] lapses, she may have the authority if she has no other means of support.

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[111] Fridman, The Law of Agency 82 (3rd ed. 1970).

[112] Debenham v. Mellon supra n.102; Paquin v. Beauclerk (1906) A.C. 148.

[113] Bromley, supra n.4 at 122.

[114] Drew v. Nunn (1879) 4 Q.B.D. 661 (C.A.).

[115] Turner-Samuels, supra n.4 at 284.

[116] Fridman, supra n.111 at 82.

[117] Matrimonial Causes Act (1965) c.72 s.20 (4).

d) The Wife as an Agent of Necessity

A deserted wife was deemed to be an agent of necessity with authority to pledge her husband's credit for necessaries. The wife's agency of necessity was abolished in England in 1970[118] but is still alive in Canada:

"Necessaries" in this context have been described as "things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife".[119] The term may include maintenance and education of the children of which the wife has custody[120] and has even been held to include £60 worth of flowers for table decoration.[121] The right to pledge the husband's credit for legal costs in bringing or defending a matrimonial suit was considered a "necessary" as early as 1845.[122] Also within this category has come the cost of a wife's prosecution of her husband on a criminal charge[123] and in certain civil cases where the wife could not otherwise have afforded a a lawyer.[124] The wife may borrow money to pay for necessaries[125] and even where she receives maintenance payments, if these are inadequate, it appears that she may pledge her husband's credit.[126]

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[118] Matrimonial Proceedings and Property Act (1970) c.33 s.41(1) (2).

[119] Phillips v. Hayter (1870) L.R. 6 C.P. 38 per Willes J. at 42; See also Manby v. Scott (1663) 1 Lev. 4; Bromley, supra n.4 at 122; Gray v. Earl Cathcart (1922) 38 T.L.R. 562; In Callot v. Nash (1923) 39 T.L.R. 291 it was held that the husband rather than the wife sets household standards and hence decides what are "necessaries".

[120] Collins v. Long (1901) 17 T.L.R. 242.

[121] Goodyear v. Part (1897) 13 T.L.R. 395.

[122] Ex p. Moore (1845) De G. 173. Held in Wright & Webb v. Annandale (1930) 2 K.B.8 that the wife had to prove adequate grounds and must not have committed adultery.

[123] Grindell v. Godmond (1836) 5 Ad. & El. 755 where held that the essence of the proceedings must be the protection of the wife rather than the punishment of the husband.

A deserted wife's agency is an irrebutable presumption of law which persists as long as she can claim her husband's conduct to have been wrongful.[127] But her agency will terminate if she commits adultery for where the right to maintenance is gone the presumptive agency goes with it.[128] The deserted wife's agency may also be terminated where it can be shown that she had sufficient means of her own with which to purchase necessaries.[129]

Fridman argues that the deserted wife is wrongly described as an agent of necessity, there being no true agency involved,[130] and he now questions how useful the principle really is since other courses of action are readily available to enable a wife obtain financial support from her husband when in need. He points out that reforms in the divorce law, by changing the whole character of the matrimonial "offence", may have dealt a severe blow to this doctrine.[131]

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[124] Wabarro v. Kennedy (1955) 1 Q.B. 575.

[125] Weingarten v. Engel (1947) 1 All E.R. 425. The lender is then subrogated to the rights of the wife's creditor, Jenner v. Morris (1861) 30 L.J. Ch. 361.

[126] Morrison, supra n.94 at 128.

[127] Fridman, supra n.111 at 82.

[128] Turner-Samuels, supra n.4 at 281; J.N. Nabarro & Sons v. Kennedy (1954) 2 All E.R. 605.

[129] Biberfield v. Berens (1952) 2 All E.R. 237 where Callot V. Nash, supra n.119 was criticized on this point. See also Bromley, supra n.4 at 123; Morrison, supra n.94 at 128; Turner-Samuels, supra n.4 at 271.

[130] Supra n.111 at 70.

e) Agreements between Spouses

The leading case of Balfour v. Balfour[132] established the principle that agreements, which if between strangers would be legally binding, will not be so if between spouses, because spouses are presumed not to intend that legal consequences should attend their agreements. This principle was confirmed in Gould v. Gould[133] where it was held that if spouses entered into an agreement while cohabiting, there was a presumption that they did not intend to be legally bound. However, although domestic arrangements are therefore not enforceable, they will be if the necessary elements for a valid contract exist.[134] However, the rule in Balfour v. Balfour worked hardship on spouses who had separated, or were about to do so, and in Merritt v. Merritt[135] it was held that in such circumstances it would be difficult to conclude that, with regard to financial arrangements, the parties did not intend to be bound.

Recent matrimonial property cases have demonstrated the difficulty in attempting to divine the intention of spouses as to whether they intended to be legally bound. As Hodgson L.J. remarked:[136]

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131. Supra n. 111 at 78.

132. (1919) 2 K.B. 571.

133. (1969) 2 All E.R. 728; (1970) 1 Q.B. 275.

134. Boston v. Boston (1904) 1 K.B. 124 where the husband had agreed with his wife to take a lease of premises.

135. (1970) 1 W.L.R. 1221.

136. Pettit v. Pettit (1970) A.C. 777 at 810.

> The conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque, and I certainly cannot take the further step of working out what they would have agreed to if they had thought of making an agreement.

Agreements between spouses regarding the matrimonial property will be discussed in a later chapter.

f) The Canadian Position

An equivalent of the English Law Reform (Married Women and Tortfeasors) Act of 1935 was not passed in the Provinces of Canada. However, more modern Married Women's Property Acts have been passed in all Provinces[137] thus achieving results similar to the 1935 Act.

The phrase "separate property", with its old connotation of the wife's separate estate, was removed from the English legislation in 1935 as being anomalous. For the same reason it was removed from the legislation of Alberta, Newfoundland, Manitoba, New Brunswick and Saskatchewan. In these Provinces a wife can therefore sue and be sued as if unmarried: she is now liable on all her contracts both ante-nuptial and post-nuptial. Her liability being now personal she can be adjudged bankrupt or have judgements enforced against her. In Saskatchewan, the husband is still liable on his wife's ante-nuptial contracts to the extent of all property which he may have acquired through her.[138] However, the phrase "separate property" has been retained in British Columbia, Ontario, Nova Scotia and Prince Edward Island. In these Provinces a married woman is declared liable on her pre-nuptial and post-nuptial contracts to the extent of her separate property, now held or later acquired, if not under a restraint from anticipation.[139] Thus the liability would appear to be still proprietary rather than personal in these Provinces.

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[137] Married Women's Property Act R.S.A. (1970) c.227.
Married Women's Property Act R.S.B.C. (1960) c.233.
Married Women's Property Act R.S.M. (1970) c.M70.
Married Women's Property Act R.S.N.B. (1952) c.140.
Married Women's Property Act R.S.N. (1963) c.227.
Married Women's Property Act R.S.N.S. (1967) c.176.
Married Women's Property Act R.S.O. (1970) c.262.
Married Women's Property Act R.S.P.E.I. (1951) c. 92.
Married Women's Property Act R.S.S. (1956) c.340

With regard to the circumstances under which a wife may pledge her husband's credit for necessaries, the position in Canada appears to be similar to that which formerly obtained in England.[140] Thus, where husband and wife cohabit, there is a rebuttable[141] presumption that the wife had the husband's authority to pledge his credit[142] for necessaries.[143] Where the parties are judicially separated, two Provinces, Alberta and

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[138] Married Women's Property Act R.S.S. (1965) c.340 s.11.

[139] Married Women's Property Act R.S.B.C. (1960) ss. 4, 6.
Married Women's Property Act R.S.O. (1970) ss. 3, 4.
Married Women's Property Act R.S.P.E.I. (1951) s.2.

[140] The Canadian cases are comparatively few. See generally Fridman, supra n.111, Anger's Digest of Canadian Law, supra n.61 at 385.

[141] Lineham v. Holden (1933) 4. D.L.R. 187.

[142] Vopni v. Bell (1908) 17 Man L.R. 417; Arsenault v. Bishop (1931) 2 D.L.R. 325; Moore, McLeod & Co. Ltd. v. Jardine (1932) 5 M.P.R. 327.

[143] Robert Simpson Co. Ltd. v. Ruggles (1930) 3 D.L.R. 174; Gebbie & Forrest v. Kershaw (1927) 3 D.L.R. 156; Owen Sound General & Maine Hospital v. Mann (1953) O.R. 643.

British Columbia, have made statutory provision establishing the busband's liability for necessaries supplied to the wife where alimony is ordered and unpaid.[144]

In view of provisions which enable a deserted wife to apply to the courts,[145] and in view of Fridman's arguments[146] and also the difficulties which can arise with creditors, it is submitted that the agency of necessity is not only outmoded but quite unnecessary in the Provinces of Canada today and should be abolished.

It is further submitted that continued use of the term "separate property", with its old technical connotation of a wife's separate estate, is an anachronism which serves no useful purpose and which should be removed from the legislation of the few Provinces which still retain it.

g) The Wife as a Trader

The Married Women's Property Act of 1882 made it clear that with the ability to enter into contracts and be held liable thereon as if she were a feme sole,[147] the married woman could also enter into trade. Thus it was provided that she was entitled to hold as her separate property all real and personal property acquired in any "employment, trade or occupation".[148] It was further provided that

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[144] Domestic Relations Act R.S.A. (1970) c.113 s.13; Divorce & Matrimonial Causes Act R.S.B.C. (1960) c.118 s.10.

[145] E.g. in Alberta, The Domestic Relations Act R.S.A. (1970) c.113 s.27 provides that a married woman, deserted by her husband who has failed to supply her with food and necessaries, may apply to the court which can summon the husband and order him to provide for his wife.

[146] Supra at 24.

[147] 45 & 46 Vict. c.75 s.1(2).

> Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.[149]

A like situation obtains in all Provinces of Canada[150] although only some Provinces have included a specific reference to trade in their Married Women's Property Acts.[151] The married woman trader is of course subject to insolvency and bankruptcy laws as any other person.[152]

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[148] Id. s.2.

[149] Id. s.1(5).

[150] Anger's Digest of Canadian Law, supra n.59 at 385.

[151] R.S.O. c.262 s.2; R.S.P.E.I. c.92 s.3; R.S.S. c.340 s.4; R.S.N.S. c.176 s.4; R.S.B.C. c.233 s.8.

[152] Law Reform (Married Women and Tortfeasors) Act (1935) ss. 1(d), 2(1); The Bankruptcy Act R.S.C. 1970 c.B-3. See generally Turner-Samuels, supra n.4 at 327.

2. TORT

a) Torts between a Married Woman and a Stranger

In England The Law Reform (Married Women and Tortfeasors) Act of 1935 absolved the husband, *qua* husband, from liability for his wife's torts both before and after marriage so that he could no longer be sued or made a party to proceedings concerning such a tort.[153] The wife thereupon became liable for her torts and could sue or be sued as if a *feme sole*.[154] A wife could still be jointly sued with her husband in cases of joint liability[155] however and where the wife committed a tort while formally acting as her husband's agent, both would be liable jointly and severally.[156]

In Canada, by their respective Married Women's Property Acts, Alberta, Newfoundland, Manitoba and New Brunswick have declared a wife completely liable for her ante-nuptial torts;[157] the remaining Provinces have rendered her liable for such torts to the extent of her separate property.[158] In Saskatchewan, Nova Scotia and Prince Edward Island the husband is made expressly liable for his wife's ante-nuptial torts to the extent of all property acquired by him through his wife.[159]

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[153] 25 & 26 Geo.5 c.30 s.3.

[154] *Id.* ss. 1, 3.

[155] *Id.* s. 4(2)(c).

[156] *Burdett* v. *Horne* (1911) 28 T.L.R. 83.

[157] R.S.A. (1970) c.227 s.7; R.S. Nfld. (1963) c.227 s.4; R.S.M. (1970) c.M.70 s.3(a); R.S.N.B. (1952) c.140 s.2(a).

[158] R.S.O. (1970) c.262 s.8; R.S.S. (1965) c.340 s.10; R.S.N.S. (1967) c.176 s.18; R.S.B.C. (1960) c.233 s.14; R.S.P.E.I. (1951) c.92 s.10.

Concerning liability for torts committed during the marriage, the first group of Provinces above referred to, makes the wife completely liable[160] while the second group makes her liable to the extent of her separate property.[161] Most provinces have made statutory provision for action by and against the husband and wife jointly in tort in cases of dual cause or liability.[162]

b) Torts between Husband and Wife

All common law provinces of Canada followed the English 1935 Act in making statutory provision enabling the wife to sue her husband in tort for the protection and security of her property.[163] In all Provinces except British Columbia, "property" has been statutorily defined as including a chose in action.[164] In the much critized case of Curtis v. Wilcox[165] it was held that "property" included a chose in action so that a wife could, after marriage, sue her husband for injury caused by his negligence before marriage. Kahn-Freund contends that this decision "rests on fallacious reasoning in that it confounds the thing which protects with the thing which is protected."[166] The Saskatchewan Court of Appeal has held that the phrase "for protection and security of her property" does not limit a wife's right of action to those situations where she could show some harm or injury to her property as such.[167] But it has been held that a wife cannot sue her husband for false imprisonment and malicious prosecution,[168] for deceit[169] or for damage for fraudulent conspiracy;[170] nor can she sue him for libel[171] or assault,[172] since such are not regarded as remedies for the protection and security of her property. But a startling decision of the Ontario Court of Appeal has just been reported[173] where the principle that a wife may sue her husband for protection of her property has been extended, or interpreted, to include personal injury providing the parties are no longer married when action commenced. It was held in this case that after their marriage had been annulled, the woman could sue her former husband for damages in respect of injuries sustained by her during the marriage as a result of a car accident caused by the husband's negligence. The Appeal Court held a) that the common law fiction of unity had been abolished by the Married Women's Property Act and b) that the concluding words of section 7, "... except as aforesaid no husband or wife is entitled to sue the other for a tort", was purely procedural in nature.

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[159] R.S.S. (1965) c.340 s.11; R.S.N.S. (1967) c.176 s.19; R.S.P.E.I. (1951) c.92 s.11.

[160] R.S.A. (1970) c.227 s.2(c); R.S.Nfld. (1963) c.227 s.2(b); R.S.M. (1970) c.M70 s.3(d); R.S.N.B. (1952) c.140 s.2(d).

[161] R.S.O. (1970) c.262, s.3(1); R.S.S. (1965) c.340 s.10; R.S.N.S. (1967) c.176 s.12(1); R.S.B.C. (1960) c.233 s.4; R.S.P.E.I. (1951) c.92 s.2(2).

[162] R.S.A. (1970) c.227 s.8(c); R.S.Nfld. (1963) c.227 s.6(c); R.S.S. (1965) c.340 s.12; R.S.N.S. (1967) c.176 s.20; R.S.M. (1970) c.M70 s.6(b); R.S.P.E.I. (1951) c.92 s.12; R.S.N.B. (1952) c.140 s.5(b).

[163] Law Reform (Married Women and Tortfeasors) Act (1935) s.6(1)(a); R.S.M. (1970) c.M70 s.7(1); R.S.P.E.I. (1951) c.92, s.9; R.S.N.S. (1967) c.176 s.17(1); R.S.B.C. (1960) c.233 s.13; R.S.S. (1965) c.340 s.8(1); R.S.O. (1970) c.262 s.7; R.S.Nfld. (1963) c.227 s.13; R.S.A. (1970) c.227 s.3(1); R.S.N.B. (1952) c.140 s.6(1); Laxton (or Ulrich) v. Ulrich (1964) 1.O.R. 193.

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[164] R.S.A. (1970) c.227 s.2; R.S.N.S. (1967) c.176 s.1(e); R.S.Nfld. (1963) c.227 s.27; R.S.P.E.I. (1951) c.92 s.1(b); R.S.N.B. (1952) c.140 s.1; R.S.O. (1970) c.262 s.1(b); R.S.S. (1965) c.340 s.2(a); R.S.M. (1970) c.CM-70 s.2

[165] (1948) 2 K.B. 474 overruling Gotliffe v. Edelston (1930) 2.K.B. 278.

[166] Supra n.99 at 151.

[167] Thomas v. Thomas (1961) 29 D.L.R. 576.

[168] Tinkley v. Tinkley (1909) 25 T.L.R. 264.

[169] Hulton v. Hulton (1917) 1.K.B. 813.

[170] Kennedy v. Tomlinson (1959) 20 D.L.R. (2d.) 273.

[171] Ralston v. Ralston (1930) 2 K.B. 238.

[172] Phillips v. Barnet (1876) 1 Q.B.D. 436.

Husbands, however, could not sue their wives in respect of damage to their property.[174] This injustice has been remedied in the Provinces of Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia where, in all but Saskatchewan, it is expressly provided that the husband has a reciprocal right to sue his wife in tort for the protection of his property.[175] Salmond and Lush maintain that this exception in favour of the wife alone was a mere oversight in the Married Women's Property Act of 1882.[176].

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173. Manning v. Howard (1975) reported in Canadian Current Law 1787 (Ont.C.A.).

174. Bayliss v. Blackwell (1952) 1 K.B. 154.

175. R.S.A. (1970) c.227 as amended (1973) c.61 s.11; R.S.M. (1970) c.M70 s.7(3); R.S.N.B. (1952) c.140 s.6(3); R.S.S. (1965) c.340 s.8(2); R.S.N.S. (1967) c.176 s.17(2). In Saskatchewan there is a general provision for action in respect of property rights.

176. Salmond on Torts 360 (16th ed. 1973); Lush, Husband and Wife 583 (4th ed. 1933).

The difficulties which arose from the general inability of spouses to incur liability in tort with regard to each other has been alluded to in the previous chapter.[177] In England, the recommendations of the Law Reform Commission[178] led to the removal of this disability in The Law Reform (Husband and Wife) Act of 1962.[179] Each party was given by this Act the like right of action in tort against the other as if unmarried but the courts were given discretion to stay such action if it appeared that no substantial benefit would accrue from the proceedings or if the issue would more conveniently be disposed of under Section 17 of the Married Women's Property Act of 1882;[180] the courts were also given authority to exercise any power which could be exercised under Section 17.[181]

The 1962 Act is seen as a measure to mitigate the rigidity of the separation of matrimonial property and to enable spouses to assert property claims concerning common assets which are legally separate.[182]

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177. Supra at

178. Law Reform Committee 9th Report (1961) Cmnd. 1268.

179. 10 & 11 Eliz.2 c.48.

180. Id. s.1(1). Sec. 17 of the 1882 Act provided a summary procedure for determining property questions between spouses.

181. Id. s.1(2). It appears that the Bill as originally passed through the House of Commons provided that where Section 17 could have been invoked, the spouses' power to sue each other was to have been completely excluded, Kahn-Freund, Law Reform (Husband and Wife) Act 1962, 25 M.L.R. 697.

182. See generally Kahn-Freund, supra; Winfield and Jolowicz on Tort 613 (9th ed. 1971); Bromley, supra n.4 at 280; Ontario Law Reform Commission: Torts (1969); Salmond, supra n.176; Stone Report on Committees, (1961) 24 M.L.R. 481; Glanville Williams, Some Reforms in the Law of Tort, (1961) 24 M.L.R. 101; Law Reform Committee, supra n.178.

Common to all Provinces of Canada is the general restriction that neither spouse can sue the other in tort and so the debate continues as to the most appropriate type of reform to remedy this unsatisfactory situation.[183] The consensus of opinion appears to be that the underlying reason for this rule is no longer the concept of unity of personality but the danger of disrupting the matrimonial harmony. As Kanowitz says "... a husband could beat his wife mercilessly causing her permanent injury ... but the law in its rectitude denied her the right to sue her husband because such a suit ... could destroy the peace of the home."[184] There was also the fear that to permit suits between spouses for negligently inflicted injuries would result in a large number of fraudulent claims. It is argued that the need to preserve domestic amity is a futile argument in that a spouse may lay criminal charges against the other and a parent may be sued for negligence by his child.[185]

One of the strongest reasons for change is that where the wife is injured through the negligence of her husband and another, she can only

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183. *See generally*, *Morrison*, *supra* n.94 at 88; Mendes da Costa *Husband and Wife in the Law of Torts in Studies in Canadian Tort Law* 470 (2d. ed. 1972); *Kahn-Freund*, *supra* n.99; *Kanowitz*, *supra* n.4 at 75; *United Nations Commission on Status of Women: Legal Status of Married Women* 81 (1958); Hoyt, (1961-65) 13 U.N.B.L.J. 32; Hughes and Hudson, (1953) 31 Can.Bar.Rev.41; Brown, *Married Women and Tortfeasors* (1936) 14 Can.Bar.Rev.265; Winfield, *Recent Legislation on the English Law of Tort*, (1936) 14 Can.Bar.Rev.653.

184. *Supra* n.4 at 75.

185. *Hoyt*, *supra* n.183 at 33.

recover damages from the other and, because of the husband's lack of liability, the other cannot recover a contribution from the husband.[186] Where the husband was acting as the agent of another, the injured wife could claim from the other on the principle of vicarious liability.[187]

Winfield has taken the view that regrettable and inconsistent though the present situation is, it is better on the whole that the law be left as it is otherwise suits in tort between spouses would tend to be used "primarily to vindicate their spite."[188] Kahn-Freund, while deploring the failure of the 1935 Act to abolish the common law rule against substantive liability, and the failure of the courts to comprehend that the whole body of legislation on married women should be understood "as a removal of the doctrine of unity and all its excrescences", was also of the view that while spouses are living together they should not be able to sue each other for assault or defamation or even negligence.[189] The English Law Reform Committee, having concluded that there was no logical reason why spouses should be debarred from suing each other, acknowledged that complete freedom of action in tort was not in the interest of good social

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186. Drinkwater v. Kimber (1952) 2 Q.B. 281. This situation was remedied in Australia by the provision that a third party could join a concurrent tort-feasor who was a husband as though he were not married to the injured wife. [Act No. 5382 (1949) s.2(1)(d)].

187. Smith v. Moss (1940) 1 K.B. 242; Broom v. Morgan (1953) 1 Q.B. 597.

188. Supra n.183 at 655.

189. Supra n.99 at 144.

policy and therefore advocated judicial discretion to stay proceedings in order to preclude petty litigation.

An exception to the general rule of inter-spousal tort immunity is embodied in the legislation of Manitoba and New Brunswick where it is provided that spouses may sue each other in tort with regard to torts committed while living apart under a decree or order of judicial separation.[190]

The Ontario Law Reform Commission, having examined in depth the question of inter-spousal immunity in tort, has concluded that there is not a satisfactory rationalization of the existing law in Canada in this area, and it recommends legislation to enable husband and wife to sue each other generally in tort with no provision for staying proceedings as in England.[191]

It is submitted that an unqualified right of action between husband and wife in tort might well give rise to trivial actions the pursuit of which, by engendering and promoting adversary positions, could endanger a marriage which might otherwise have survived. A similar argument was discarded by the Ontario Law Reform Commission and by the State of Victoria Law Revision Commission[192] on the ground that the protection afforded by an unrestricted right to sue each other would more than outweigh the possible breaking up of what was probably an already unstable marriage; furthermore, they said, no ill-effects had been experienced where there existed an unrestricted right to sue each other on pre-marital torts. It is respectfully submitted that the assumption that a marriage is already at breaking point when such action would be commenced is unwarranted; that a qualified right of action does not imply a lesser degree of protection, and that the number of actions on pre-marital torts must surely be too few upon which to base a judgement. It is, therefore, recommended that the relevant sections of the provincial Married Women's Property Acts be repealed and that legislation be enacted enabling husband and wife to sue each other in tort but with a discretionary power in the court to stay action where it appeared that no substantial benefit would accrue to either party from continuing the proceedings.

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[190] R.S.N. (1963) c.227 s.7(2)(b), R.S.N.B. (1952) c.140 s.6(2)(b).

[191] *Supra* n.182 at 50, 59.

[192] *State of Victoria Statute Law Revision Committee Report on Actions Between Husband and Wife* 2046/66 para. 17.

c) Actions for Loss of Consortium

As a result of the old common law belief that the husband had a proprietary interest in his wife which gave him a right to her services and company, he has today, in both England and Canada, a cause of action against any person whose tortious act against his wife deprives him of her consortium. The loss of consortium may be by injury caused to the wife through negligence[193] or in the form of enticement, harbouring or criminal conversation.

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[193] Winfield points out that where a wife is negligently injured by a stranger, in addition to the wife's claim the stranger may be held liable in full to the husband for the latter's loss of consortium even where the wife was also negligent, Winfield, supra n.183 at 615.

Except in Alberta,[194] the wife has no reciprocal right of action against a person whose negligence deprives her of her husband's consortium.[195] This position was affirmed in Best v. Samuel Fox Ltd.[196] where the House of Lords concluded that today, while it was anomalous to grant such a right to the husband and not to the wife, the real anomaly was the husband's right to seek such an action and there was no reason to extend such an anomaly by granting a like right to the wife. Fridman contends that such actions, by either spouse, are far from anomalous;[197] that if the matrimonial relationship is of any social value both parties have an interest, which should be protected by law, of preserving it intact. He argues that the wife's interest in the consortium is protected by a number of legal rights which give rise to corresponding duties to be observed by the world at large, therefore the wife should be entitled to sue for loss of consortium either in respect of acts which intentionally interfere with the consortium or where a reasonable man could have anticipated that such would be the effect of his acts.

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[194] The Domestic Relations Act (1970) c.113 as amended (1973) c.61 s.35.

[195] Salmond, supra n.176 at 360. See generally Payne, Right of Marital Consortium, 8.J.Fam.Law 50; Ontario Law Reform Commission, supra n.182 at 86; Marsh, The Wife's Interest in the Consortium, (1967) 67 L.Q.R. 37; Conservative Political Center, supra n.4 at 27; Fridman, Consortium as an Interest in the Law of Torts, (1954) Can.Bar.Rev.1065; West, Notes, (1975) 33 U.T.L.R. 76.

[196] (1952) A.C. 716.

[197] Supra n.195.

While in general a wife has no action against a third party whose negligence results in injury to the husband with consequent impairment of the consortium, if such impairment were the result of injury to herself she could claim damages for loss of consortium as a consequential damage flowing from the third party's negligence.[198]

In view of the fact that the common law action for loss of consortium derived from the husband's proprietary right to the services of his wife, this action is clearly anachronistic. However, it is recommended that, in cases where wilful or negligent misconduct led to the loss of consortium, there be instituted generally a statutory right to damages, at the suit of the wife as well as the husband; such damages would not be of a punitive nature and should be in respect of loss of material benefits or services only.

Actions for enticement and harbouring have now been abolished in England,[199] but are still alive in Canada. Enticement is the depriving of the husband of his wife's consortium and differs from the common law action of criminal conversation in that adultery need not be alleged or proved. In British Columbia[200] and Ontario[201] the right to sue for damages in an action for enticement has been extended by the courts to a wife deprived of her husband's consortium, as was the case in England, prior to the abolition of such action.[202] In Alberta, the Domestic Relations Act has been amended to provide for action by either spouse, for enticement[203] or harbouring.[204] It is recommended that each province make statutory provision enabling the wife as well as the husband to maintain an action for enticement. It is further recommended that actions for harbouring be abolished as an anachronism.

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[198] Payne, supra n.195 at 52.

[199] Law Reform (Miscellaneous Provisions) Act (1970). s.5.

[200] Judge v. Smith (1962) 30 D.L.R. (2d.) 521.

[201] Applebaum v. Gilchrist (1946) 4 D.L.R. 383 (Ont. C.A.); but see Banks v. Done (1934) 1. D.L.R. 789.

Criminal conversation was replaced in England by an action by the husband to recover damages from a man who had commited adultery with his wife but such action has now been abolished.[205] Some Canadian Provinces have adopted this form[206] while others have retained the action for criminal conversation.[207] Except in Alberta,[208] damages for adultery have always been available only to the husband. The historical reasons for denying such action to a wife now having disappeared, there is no longer any reason for discrimination in this regard. But rather than recommend that action for damages be extended to the wife, it is recommended that this action be abolished a) because of the difficulty in proving that the adultery resulted in real damage to the consortium, b) because of the difficulty in assessing the value of chastity in a particular person and in maintaining an unbiased stance in such claims and c) because of the difficulty in ascertaining that the blame really belonged with the adulterer rather than the spouse.

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[202] Payne, supra n.195 at 46; Place v. Searle (1932) 2 K.B. 497.

[203] R.S.A. (1970) c.113 as amended (1973) c.61 s.32.

[204] Id. s.33.

[205] Matrimonial Causes Act (1857) 20-21 Vict. c.85 s.59. The right to claim damages for adultery was abolished by the Law Reform (Miscellaneous Provisions) Act 1970 s.4.

[206] For example, R.S.A. (1970) c.113 s.14.

[207] Criminal conversation exists in Manitoba, Saskatchewan, Ontario and the Maritime Provinces.

[208] The Domestic Relations Act (1970) c.113 as amended (1973) c.61 s.14.

It is the recommendation of the Ontario Law Reform Commission that actions for adultery, enticement and harbouring of a spouse all be abolished as having no place in our modern legal system.

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3. PENSIONS AND OTHER BENEFITS

a) Family Allowance and Social Assistance

The assumption is no longer valid that marriage ensures lifelong economic security for the married woman and so her civil rights include certain pension and other benefits sponsored by the State.

Help is afforded the married woman with children by the Family Allowance scheme,[209] the object of which is to augment the income of families with children so that they are less disadvantaged vis-à-vis non-children families than they would otherwise be. Statutory increases to keep pace with the cost of living are regularly enacted by Parliament. While these allowances are payable both in England and Canada, in England *no* allowance is payable for the first child. In order to provide more benefit to low income earners, the family allowance was always taxable in England and as from 1975 is taxable also in Canada. These allowances belong in law to the wife.

The aim of social assistance in England, now known as Supplementary Benefits, is to bring a person's resources up to a level approved by Parliament. It is available to married women, *inter alia*, who are below pensionable age, not in full-time work, and whose resources fall short of the statutory requirement.[210] In Canada social assistance under the Canada Assistance Plan is provided by the Federal Government[211] the administration of which is carried out by the individual provinces which provide in general that the criterion for qualification is to be in need.[212] It is frequently used to assist old age pensioners, women between the ages of 60 and 65 not yet eligible for a pension, and those for whom existing benefits are inadequate.[213] Reports show that women are specially vulnerable to proverty and in particular the married woman with children.[214] The most urgent need for benefits appears to be that of the sole-support mother for whom social assistance payments are often inadequate.[215]

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[209] See generally *Central Office of Information*, *Social Security in Britain* (1970); *The Canada Pension Plan* (1970) Gov.Doc.H.21-3770.

[210] *Social Security in Britain*, *supra* at 32.

[211] Canada Assistance Plan R.S.C. (1970) c.C-1.

b) Health Insurance Benefits

In both England and Canada the married woman may rely on her husband's contributions to the various schemes in order to obtain health care.[216]

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[212] Social Assistance Act R.S.B.C. (1960) c.360 as amended: Social Allowance Act R.S.M. (1970) c.S160 as amended; Social Assistance Act N.B. (1960) c.9 as amended; Social Assistance Act Nfld. (1962) c.4 as amended; Social Assistance Act N.S. (1970) c.16 as amended; Family Benefits Act R.S.O. (1970) c.157 as amended; Saskatchewan Assistance Act Sask. (1966) c.32 as amended.

[213] Royal Commission on Status of Women in Canada, supra n.4 at 327. For a general review of provincial welfare schemes see Fodden, Family and Welfare Assistance Legislation in Canada in 2 Studies in Canadian Family Law, supra n.49 at 765.

[214] See generally the Royal Commission on the Status of Women in Canada, supra n.4 at 313; Women and the Law in New Brunswick, supra n.11 at 30; Labour Canada: Women's Bureau '73 40 (1973); Fodden, supra at 757.

[215] In Canada almost one tenth of the female working force (a quarter of a million women) are separated, deserted, divorced or widowed; Canada Department of Labour, Women's Bureau: Women in the Labour Force 1971.

[216] See generally Social Security in Canada 1969 Gov.Doc.Social Security Series 18 (1970); Social Security in Britain, supra n.209.

In England, if a wife is working, she must participate in the National Social Security Scheme[217] and she then receives more benefits than the non-contributing wife. In Canada, hospital care is provided at the standard-ward level through federal-provincial insurance programs[218] while medical care is provided through provincial medical care plans.[219] While this is not the place for a comparative study of the complex health insurance schemes in England and Canada, mention should perhaps be made of the comprehensive scheme of assistance for mothers which is available in England.

Nine weeks before confinement the pregnant woman is entitled to a substantial maternity grant and in the case of a multiple birth, to a similar grant for each child surviving for 12 hours after birth.[220] Where a woman has been working and herself paying national insurance contributions, she is also entitled to a maternity allowance for eleven weeks prior to, and six weeks after, the birth.[221] In addition, the local authorities are bound to provide for the dental care of expectant and nursing mothers, for midwifery service for those who wish to be confined at home, for domestic help in the home while lying-in, for provision of ambulance service where required for expectant and nursing mothers, and

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217. The English system is to deduct from workers' earnings one payment that covers health insurance, unemployment benefit, pensions benefits and industrial injury benefits (where applicable). The employer also contributes in respect of each employee.

218. Hospital Insurance & Diagnostic Services Act. R.S.C. (1970) c.H-8.

219. Medical Care Act R.S.C. (1970) c.M-8.

220. This was approximately $63 in 1970 and intended to cover essential purchases for the new baby.

221. In 1970 approximately $12.50 per week.

health visiting and home nursing when required in the home. In Canada, as a matter of policy, there is now provision for unpaid maternity leave for public service employees with benefits payable under the Unemployment Insurance Act to those with the required service.[222]

c) Retirement and Old Age Pensions in England and Canada

The English retirement pension is a standard flat-rate sum available to women at 60 and men at 65 who have made the required number of contributions. A husband will receive a state retirement pension for himself and his non-working wife will receive a pension of a little more than three fifths of that of the husband when the husband reaches 65. If the wife has been working and contributing, however, she will receive a retirement pension equal to that of her husband when she reaches 60 years of age. If the spouses continue to work after retirement age, the pension is reduced accordingly until they reach 70 and 65 respectively when the earnings rule no longer applies.[223]

Where a married woman does not work, or if she is self-employed, she is excepted from liability to pay social security contributions in England and where she works she may elect to rely on her husband's contributions or pay her own.[224] Because the married woman contributor will only receive benefits at a higher level if she is entitled to a higher pension than her husband, few women stand to gain by contributing and few do in fact con-

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222. Munro, Status of Women in Canada 7 (1973).

223. Social Security in Britain, supra n.209. The standard rate in 1970 was approximately $12.50 per week.

224. National Insurance Act (1946) 9 & 10 Geo.6 c.67; National Insurance (Married Women) Regulations (1948) S.I 1948 No. 1470.

tribute. Present policy is to continue to give the wife this option.[225] Because of the inadequacy of the state pension, many private occupational pension schemes are in operation[226] but normally only the larger firms are in a position to offer such and they do not usually include potential short-term employees, within which category many married women fall.

The Canada Pension Plan,[227] to which all men and women in employment must contribute, provides a state retirement pension to which access is not possible for either women or men before 65 years of age. The pension may diminish if the pensioner is employed between 65 and 70. Unlike the English scheme for a flat rate, the amount of the retirement pension in Canada is based on the contributor's average pensionable earnings, and so the pension is higher. There was no separate pension for a non-contributing wife as in England until the Federal Government introduced a Bill, which came into force on October 1, 1975, to extend pension benefits to the spouse of the pensioner if the former is aged 60 or older.[228]

Occupational pension schemes are also widespread in Canada, the majority of which have been integrated with the Canada Plan.[229] This integration involves one level of benefits and contributions on earnings up to the Canada Pension Plan ceiling and a higher level of benefits and contributions on earnings over the ceiling.

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[225] Department of Health and Social Security: Strategy for Pensions (1971).

[226] In 1971, 2/3 of male and 1/4 of female employees were members of occupational pension schemes in England, Strategy for Pensions, *supra* at 16.

[227] The Canada Pension Plan, *supra* n.209.

[228] Old Age Security Act R.S.C. (1970) c.0-6 as amended (1975).

[229] A Study of Canadian Pension Plans (National Trust Coy. Ltd.) 3 (3rd ed. 1969).

Old Age Security pensions are payable in Canada, whether or not benefits have been earned under the Canada Pension Plan, and may be in addition thereto, for men and women over 65 years of age who meet certain residence requirements.[230] In addition a Guaranteed Income Supplement may be added to the Old Age Security Pension where there is no, or minimal, other income.[231]

d) Death Grant and Widow's Pension

In England, on the death of a person who has made the required social security contributions, or on the death of such a person's spouse, a death grant is payable.[232] In Canada, for those with the required contributions to the Canada Pension Plan, the deceased's estate receives as a Death Benefit a lump sum equal to six times his or her monthly retirement pension.[233]

In England there is a graduated scheme of benefits for widows whose

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230. The Canada Pension Plan, supra n.209 at 14. The general requirement is residence in Canada for 10 years prior to application.

231. In 1973 the Old Age Security Benefit was raised to $100 per month for eligible men and women and the Guaranteed Income Supplement to $70.14 per month with provision for regular escalation, Status of Women in Canada, supra n.213 at 38.

232. Social Security in Britain, supra n.209 at 20. In 1970 the grant was approximately $63.

233. The Canada Pension Plan, supra n.209 at 24. In 1970 the benefit could not exceed $530.

husbands had made the required social security contributions.[234] On the husband's death the widow receives a widow's allowance for 26 weeks. When this allowance terminates, if the widow has children within family allowance age limits she will then receive a widowed mother's allowance and will also start to receive a widow's pension. In Canada, a widow's pension is payable where the husband had contributed to the Canada Pension Plan and it will vary according to her age and circumstances.[235] Where a widow is entitled to receive a retirement pension in her own right plus a widow's pension, the two are combined in certain proportions.[236]

e) Conclusions

It is alleged by reformers that welfare legislation often operates to the disadvantage of women by denying equal treatment on the ground of personal morality.[237] Fodden also is of the view that legislation reveals certain underlying moral attitudes the effect of which is to place a risk on the recipient rather than a financial risk on society.[238] He cites the "man in the house" rule under which a woman recipient, living with a man other than her husband, is given the choice of having her welfare benefits terminated or living alone. Mendes da Costa alleges that this is still practiced in at least Ontario: that there is an express provision in the Province[239] that no deserted wife or unwed mother is eligible for Family Benefits if not living as a single person and furthermore municipal programs are believed to have adopted such practices without legislative base.

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[234] Social Security in Britain, supra n.209 at 20. In 1970 the standard widow's pension was approximately $13. per week.

[235] The Canada Pension Plan, supra n.209 at 25. Under 65 the full pension of a flat rate plus 37.1/2 per cent of the current value of her deceased husband's monthly retirement pension is payable: if over 65 it is 60 per cent of the current value.

[236] Canada Pension Plan, supra n.209 at 29.

[237] Women's Bureau '73, supra n.214 at 37.

[238] Family and Welfare Assistance, supra n.213 at 757.

Another practice deserving of critical examination is that employed by some provinces of requiring the deserted wife to bring an action of non-support against the husband before being considered eligible for welfare.[240] Such a procedure raises the question of whether the deserted wife is not entitled to invoke society's assistance for her support as is a man or a single woman, and that it is an anachronism that her entitlement should rest solely on her status as a dependent of the deserting husband.

It is recommended that provincial governments be requested to introduce amending legislation to ensure

a) that welfare benefits will not be withdrawn from recipients whose private lives do not conform to the moral standards of the legislative or administrative bodies concerned and

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[239] R.S.O. (1970) Reg. 287 (F.B.) s.6(b).

[240] Woman and the Law in New Brunswick, supra n.11 at 30; Women's Bureau '73, supra n.214 at 12.

b) that an action for non-support against a deserting father will not be deemed a prerequisite to the obtaining of financial relief by the deserted wife.

With regard to pension plans, the Royal Commission on the Status of Women recommended that the spouse remaining at home be enabled to participate in the Canada Pension Plan by crediting to the spouse remaining at home a portion of the contributions of the employed spouse and those contributions made by the employer on the employed spouse's behalf.[241] This proposal was aimed at overcoming, at least in the later years, the financial dependence of most married women on their husbands and was to overcome the injustice inherent in the situation where a woman divorced after many years as a wife and mother, is baulked of a widow's pension which may go to a recently acquired second wife. The Royal Commission also recommended on an optional basis permitting the spouse at home to contribute as a self-employed worker.

Another contentious matter considered by the Royal Commission is the prevalence of sex difference in both public and private pension plans,[242] the most significant of which lies in the benefits provided for the spouse and children of a contributor. The husband and child of a female contributor are not generally entitled to pension or benefits.[243] The Commission has therefore recommended that Canada Pension Plan legislation be amended so that provisions applicable to the wife and children of a male contributor will also be applicable to the husband and children of a female contributor.[244] These matters are at present being considered by the Federal Government and Provinces but the agreement of two thirds of the latter is required before any changes can be made in the Plan.[245]

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[241] Supra n. 4 at 40.

[242] Supra n. 4 at 81.

It is recommended that the federal government be asked to give priority to the above matters and that each provincial legislature be urged to consider and make representations to the federal government thereon as soon as possible.

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243. For example, in the case of a University staff member contributing both to the Canada Pension Plan and the U. of A. Academic Pension Plan, the Canada Pension Plan provides that where the beneficiary is the widow or a dependent child under 21 both staff member and University contributions plus interest are paid to the beneficiary. But any other beneficiary receives only the staff member's contribution plus interest. Under the Academic Pension Plan where the beneficiary is the widow of a staff member with at least 10 years service the widow receives a life pension equal to the joint survivor equivalent of the staff member's accrued pension entitlement: otherwise a beneficiary receives only the staff member and University contributions plus interest. Participation by a married woman in private pension plans is usually optional.

244. Supra n.4 at 82.

245. Status of Women in Canada, supra n.222 at 11.

4. CRIMINAL LAW AND THE MARRIED WOMAN

a) Capacity in Criminal Law

In both England and Canada the presumption has been abolished that the wife's offence was committed at the instigation of her husband but it is a good defence to prove that it was committed in the presence of or under the coercion of the husband.[246] A married woman is therefore responsible for her criminal actions unless she can show that she acted under her husband's instructions or in the capacity of his agent.

With regard to the bringing of criminal proceedings against a spouse in England, by the Theft Act of 1968 a spouse has the same right to bring such proceedings for any offence against the other as if they were not married.[247] This altered the situation which previously obtained but the 1968 Act contained a proviso [248] precluding action by a spouse for stealing or unlawful damage to the property of the other spouse unless the consent of the Director of Public Prosecutions had been obtained; such consent not being required if spouses were under no legal obligation to cohabit.

In Canada the situation is similar to that which existed in England prior to the 1968 Theft Act: a married woman cannot take criminal proceedings against her husband concerning her property while they cohabit, or upon separation, with regard to acts done during cohabitation unless done when leaving or deserting or about to leave or desert.[249]

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[246] Criminal Justice Act (1925) 15 & 16 Geo.5 c.86 s.47; Snow's Criminal Code of Canada s.18 (7th ed. 1974). Treason and murder are exceptions to the rule, 1 Hale P.C.45.

[247] C.60 s.30(2).

[248] *Id.* s.30(4).

A married woman has no liability for the criminal acts of her husband in which she has not participated unless he has acted as her agent and without _mens_ _rea_.[250] In Canada she cannot be convicted of being an accessory after the fact to her husband's felony, or that of her husband's accomplice, by receiving, comforting or assisting them to enable them to escape.[251] But in England she now may be liable for assisting her husband unless she can prove coercion.[252] In England a married woman may also be convicted of handling goods stolen by her husband.[253] However, if the husband has committed treason, the wife will not be guilty thereof on the mere ground that she received him.[254] The old common law rule that husband and wife could not conspire together has been reversed in England[255] but still appears to be the law in Canada.[256]

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[249] Married Women's Property Act (1882) 45 & 46 Vict. c.75 s.12; _Snow_, _supra_ n.246 s.289.

[250] 19 _Halsbury's Laws_ 874 (3rd ed. Simonds 1957).

[251] _Snow_, _supra_ n.246 ss.23(2)(3).

[252] 10 _Halsbury's Laws_ at 73 s.542 note (q)(supp. 1974).

[253] _Supra_.

[254] 1 Hale P.C. 47.

[255] Crimes Act (1961) s.67.

[256] _Snow_, _supra_ n.246 at 225 s.423. Where the common law rule is still extant it applies even where the marriage is potentially polygamous. _Mawji_ v. _Reginam_ (1957) A.C. 126.

b) Evidence

At common law neither the husband nor the wife of a defendant was competent to give evidence either for the prosecution or the defence. An exception was where the offence was against the person[257] or the liberty of the defendant's spouse in which case the spouse could be compelled to give evidence for the prosecution without the defendant's consent.[258]

The Criminal Evidence Act of 1898 then provided that the spouse of a person charged with certain offences could be called as a witness for the prosecution or the defence without the consent of the person charged.[259] But this did not mean that a wife would be a compellable witness against her husband.[260] It was also provided that in all criminal proceedings the husband or wife of a person charged was a competent witness for the defence at every stage but could not be called as a witness except upon the application of the person charged.[261]

As has been seen, the Theft Act in England enabled husband and wife to prosecute each other for any offence. It provided that where a spouse brings proceedings against the other, the spouse is a competent witness for the prosecution. Where proceedings are brought by a third hird party, the defendant's spouse against whom an offence has been committed is competent to give evidence for either the defence or the prosecution. However, there is a proviso that neither spouse is compelled to give evidence or bound to disclose any communication made during marriage and that failure to give evidence shall not be commented upon by the prosecution.[262]

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[257] Held to be not within this exception of personal injury was the threat to murder, R v. Yeo (1951) 1 A.E.R. 864, but this case was not followed in R v. Verolla (1963) 1 Q.B. 295, where evidence of the defendant's wife was held admissible in a charge of attempting to poison with intent to murder.

[258] 10 Halsbury's Laws at 483.

[259] 61 & 62 Vict. c.36 s.4(1). While the defendant could not be cross-examined as to previous offences or character, a spouse giving evidence under this Act could be so cross-examined.

[260] Leach v. The King (1912) A.C.305.

[261] Criminal Evidence Act, supra n.242 s.1(c). Mere silence is not an application where a spouse would not otherwise be a competent witness, R v. Deacon (1973) 1 W.L.R. 696.

The Canada Evidence Act provides that the spouse of a person charged with an offence is a competent witness for the defence[263] and that the spouse of a person charged with certain offences under the Juvenile Delinquency Act and the Criminal Code is both a competent and a compellable witness for the prosecution without the defendant's consent.[264] The Act also provides that the failure of either the person charged, or his or her spouse, to testify shall not be commented upon by either the judge or counsel for the prosecution.[265] In R. v. Lee[266] Crown counsel commented on failure of the accused's wife to testify and a new trial was granted on the ground that in the particular circumstances this was fatal to the conviction.

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[262] The Theft Act 1968 c.60 s.30(2),(3). An accidental comment may not vitiate the trial, R. v. Morley (1966) 116 L.J. 725 (C.C.A.); R. v. Wickham, Ferrara and Bean (1971) 55 Cr. App.Rep. 199 (C.A.).

[263] R.S.C. (1970) C.E-10 s.4(1).

[264] Id. s.4(2).

[265] Id. s.4(5).

[266] (1970) 3 O.R. 285, (1970) 5 C.C.C. 183 (C.A.). But see R v. McConnell (1968) S.C.R. 602, 4 C.R.N.S. 269, (1968) 4 C.C.C. 257 69 D.L.R. (2d) 149 where it was held there was no miscarriage of justice where such comment had been made and therefore a new trial was not justified.

Concerning communications between spouses during marriage, as noted above, the Theft Act stipulates that a spouse shall not be compellable to disclose a communication with the other during marriage.[267] However, such communications have always been admissible as evidence if available[268] but the right to disclose is the privilege of the one giving the evidence.[269] The Canada Evidence Act also provides that spouses are not compellable to disclose a communication made between them during marriage.[270]

c) Crimes against a Wife by her Husband

A husband is neither entitled to inflict personal chastisement on his wife nor to imprison her.[271] If a husband has intercourse with his wife against her will it is not rape[272] although if he should use force or violence he may be convicted of assault.[273] He may be guilty of rape however if there has been a decree of judicial separation or even an agreement to separate.[274]

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[267] Supra n.247 s.30(3)(a).

[268] Rumpling v. Director of Public Prosecutions (1964) A.C.822 (H.L.).

[269] H.M. Advocate v. H.D. (1953) S.C. (J) 65.

[270] R.S.C. (1970) C.E-10 s.4(3).

[271] R v. Jackson (1891) 1 Q.B. 671.

[272] R v. Miller (1954) 2 Q.B. 282.

d) Conclusions

The only area in the field of criminal law where there may be need for remedial legislation with regard to married women is the section of the Canadian Criminal Code which assumes that a wife acts under her husband's compulsion when she helps his accomplice.[275] The Royal Commission has recommended that this be repealed so that wives are placed on the same footing as husbands in this regard.[276] Assurance has been given that the next time general amendments to the Criminal Code are before the Government, this recommendation will be considered[277] and the Minister of Justice is prepared to recommend accordingly to the Government.[278]

It is submitted that there is no real need for reform on this point and that the call therefor stems mainly from the unrealistic attempt to achieve absolute equality of rights and obligations between spouses. The term "compulsion" may not be apt, but it is submitted that when a wife helps her husband's accomplice she is motivated usually by a desire to assist her husband which derives from feelings of loyalty and fear of possible domestic deprivation arising from her marital status. A more enlightened reform would be to absolve either spouse from blame, for the above reasons, when helping an accomplice.

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[273] Id.

[274] Id. See also R v. Clarke (1949) 2 All E.R. 448.

[275] Snow, supra n.246 ss.23(2)(3).

[276] Royal Commission on Status of Women supra n.4 at 374.

[277] Munro, supra n.222 at 42.

[278] The Advisory Council on the Status of Women, supra n.45 at 27 s.154.

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CHAPTER FOUR PERSONAL PROPERTY RIGHTS OF MARRIED WOMEN

1. INTRODUCTION

While the rights a wife may have in the matrimonial home may be considered the most important of her property rights, her rights in matrimonial personal property are also of considerable importance. Personal property may take various forms but those which have given rise to the most controversy may be said to be wedding gifts, the housekeeping allowance and bank accounts. These personal property rights will now be examined.

2. GIFTS

a) Wedding Gifts

The situation with regard to the engagement ring is now covered by statute in England[1] where it is provided that the gift of an engagement ring is presumed to be an absolute gift. This presumption may be rebutted by proving that there was an express or implied condition to the contrary. Formerly there was a presumption that engagement rings were conditional gifts[2] and in the absence of statutory or other authority to the contrary in Canada, this may still be the case in Canada.

With regard to wedding gifts,[3] the consensus appears to be that when in doubt those given by the husband's friends and relatives will belong to the husband and those given by the wife's friends and relatives belong to the wife.[4] But this rule of thumb will not always be applied because the primary consideration is the intent of the donor.[5]

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1. Law Reform (Miscellaneous Provisions) Act 1970 c.45 s.3(2).

2. *Jacobs* v. *Davis* (1917) 2 K.B. 532.

3. See generally Khetarpal, *Property Rights of Husband and Wife: A Brief Survey*, (1969) Alta. L.R. 49; *Snell's Equity* 517 (27 ed. Megarry and Baker 1973); Bromley, *Family Law* 365 (4th ed. 1971); *Alberta Institute of Law Research and Reform, Matrimonial Property: Working Paper* 34 (1974); Cullity, *Property Rights During Marriage in Mendes Da Costa (ed.) 1 Studies in Canadian Family Law* 255 (1972); Barlow, *Gifts and Other Transfers Inter Vivos and the Matrimonial Home in Graveson and Crane (ed.) A Century of Family Law* 204 (1957).

4. *Hickens* v. *Hickens* (1945) 1 All E.R. 451 at 453 (C.A.); *Sampson* v. *Sampson* (1960) 1 W.L.R.190; *A*. v. *A*. (1905) 15 Man R.483; *East* v. *East* (1917-18)13 O.W.N. 316.

5. *McDonald* v. *McDonald* (1953) S.L.T. (Sh. Ct.)36.

Thus the court may order that a present such as a cheque, being intended for both, will be divided equally,[6] or that a present from the relatives of one spouse was by its nature obviously intended for the other spouse.[7] Again the conduct of the parties in use of a gift may indicate the intent of the donor.[8]

b) General Principle Governing Gifts Between Spouses

In England, husband and wife have been expressly empowered to convey to each other freeholds and choses in action,[9] and leaseholds and chattels.[10] In the Provinces of Canada similar rights exist.[11] However, proving that a gift has been made from one spouse to the other is often exceedingly difficult, especially where property is concerned which continues in joint use. In such cases the burden of proof is higher on a spouse than it would be on a stranger, courts being slow to infer delivery of a chattel between spouses because such an inference would facilitate the defrauding of creditors.[12]

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[6] Kelner v. Kelner (1939) 3 All E.R. 957.

[7] Sampson v. Sampson, supra n.4.

[8] Newgrosh v. Newgrosh (1950) 100 L.J. 525 (C.A.).

[9] Law of Property Act (1925) 15 & 16 Geo.5 c.20 s.72(2).

[10] Id. s.37.

[11] Married Women's Property Act R.S.B.C. (1960) c.233 s.18.
Married Women's Property Act R.S.M. (1970) c.M70 ss.6, 7.
Married Women's Property Act R.S.P.E.I. (1971) c.92 ss.2-4, 13-16.
Property Act R.S.N.B. (1952) c.177 s.22(1),(2).
Married Women's Property Act R.S.N.B. (1952) c.140 ss.2(b),(c), 3, 5.
Conveyancing and Law of Property Act R.S.O. (1970) c.85 s.41.
Land Titles Act R.S.S. (1965) c.115 s.246.
Married Women's Property Act R.S.S. (1965) c.340 ss.3-7.

[12] Bromley supra n.3 at 366; Hislop v. Hislop (1950) W.N. 124.

A gift may be effected only by deed of gift or by delivery;[13] an informal gift with mere words of gift will not suffice. Deeds of gift between spouses, in which case the property vests at once, are rare and most cases before the courts have been concerned with the concept of delivery. In the leading of case of Re Cole (a Bankrupt), Ex parte Trustee v. Cole[14] the husband, having completely furnished a new house, took his wife to it and said "It's all yours", but this was held not to constitute an effective delivery. The old maxim, that equity will not perfect an imperfect gift, still stands.

To establish a gift between husband and wife there must be a distinct act of gift coupled with evidence to show that a gift was intended; this is particularly so where the claim is made after the death of the alleged donor.[15] But if there is some act to show an intended change of ownership, delivery might be deemed effected thereby even although the chattels continue in common use.[16] Where a spouse can prove ownership, for example by holding a receipt,[17] there would appear to be no problem.

An essential element in making a gift is the intent to make an outright gift. If effected by delivery, it has been claimed that the law is not clear as to whether an intent to receive is necessary.[18] On the other hand there are cases which suggest that acceptance express or implied is necessary to complete a gift between spouses.[19]

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[13] Re Breton's Estate, Breton v. Woolven (1881) 17 Ch.416.

[14] (1963) 3 All E.R. 433 (C.A.). For criticism of Re Cole see Thornley, Notes (1964) Camb. L.J.27. See also Re Waite and Waite (1953) 9 W.W.R. 569 (B.C.); Glaister-Carlisle v. Glaister-Carlisle (1968) 112 Sol.J.215; Spellman v. Spellman (1961) 1 W.L.R.921.

[15] Thomas v. Times Book Co. Ltd. (1966) 2 All E.R. 241.

[16] Bashall v. Bashall (1894) 11 T.L.R. 152 (C.A.).

[17] French v. Gething (1922) 1 K.B. 236.

It is clear that a presumption of gift cannot be rebutted by setting up an illegal act.[20] This principle was affirmed in the recent case of Maysels v. Maysels[21] where both spouses contributed towards the purchase of property which was then put in the wife's name for protection against claims of future creditors. It was held concerning the husband's contribution, that there was a presumption of advancement in favour of the wife, which could not be rebutted by an illegal act.

In Canada, the courts have tended to follow the English Appeal Court in Re Cole.[22] However, there is authority in Saskatchewan that a gift may be made without effecting a change in reputed ownership;[23] this despite the provision in the Married Women's Property Act of 1882 which invalidated (as against the husband's creditors) gifts from husband to wife where the property "continues to be in the order and disposition or reputed ownership of the husband".[24] Similar provisions exist in Saskatchewan[25] and Nova Scotia.[26]

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[18] Barlow, supra n.3 at 204.

[19] Re Blake, Blake v. Power (1889) 60 L.T. 663; Duncan v. Duncan (No. 1) (1950) 1 W.W.R.545, (No. 2) (1950) 1 W.W.R. 571, affd. (1950) 1 W.W.R.1003 (B.C.).

[20] Re Emery's Investments Trust, Emery v. Emery (1959) Ch.410.

[21] (1974) 3 O R (2d) 321 (Ont. C.A.).

[22] Cullity, supra n.3 at 255.

[23] Standard Trust Co. v. Little (1918) 7 W.W.R. 1285 (Sask.S.C.).

c) Gifts from Husband to Wife

Where the husband transfers property to his wife the presumption of advancement has always applied so that the onus of proving that no gift had been intended lies with the husband.[27] Thus, in the absence of contrary intention, there is a presumption of gift by the husband to his wife where he purchases property or makes an investment in her name,[28] or if he places the property in joint names;[29] where shares or stock are transferred into the wife's name[30] or into joint names;[31] where a mortgage[32] or other security[33] is taken in joint names; where furniture and chattels bought by the husband are transfered to the exclusive possession of the wife.[34] Recent cases, however tend to show the diminishing importance of the presumption of advancement in modern society[35] and Lord Diplock in Pettitt v. Pettitt went so far as to say that it was an "abuse of legal techniques to apply presumptions to modern married couples".[36]

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[24] 45 & 46 Vict. c.75 s.10.

[25] Married Women's Property Act R.S.S. (1965) c.340 s.7.

[26] Married Women's Property Act R.S.N.S. (1967) c.176 s.11.

[27] Snell, supra n.3 at 520. As to weight of the presumption between a man and his intended wife see Ellis, The Advancement of an Intended Wife (1975) 119 Sol.J.108.

[28] Glaister v. Hewer (1903) 8 Ves. 195 at 199.

[29] Vance v. Vance (1839) 1 Beav. 605.

[30] George v. Bank of England (1819) 7 Price 646.

[31] Re Young, Trye v. Sullivan (1885) 28 Ch. 705.

[32] Re Scott, Palmer v. Vickers (1907) 97 L.T. 537.

[33] Gosling v. Gosling (1885) 3 Drew 335.

[34] Barrack v. McCulloch (1856) 3 K. & J. 110.

A wife's clothing and jewellery (paraphernalia) given by the husband are no longer in a special class of gifts; they are now presumed to belong outright to the wife and are liable to be taken by her judgment creditors.[37]

Life assurance policies are another form of gift. When a husband takes out a life assurance policy in favour of a named wife, unless the benefit is conditional on survival, she takes an immediate vested interest which, on predeceasing her husband, passes to her personal representatives[38] and will be unaffected by the husband's remarriage.[39] If the wife is unnamed in the policy and predeceases her husband, her personal representatives have no claim. If the husband remains unmarried the policy monies will form part of his estate.[40]

d) Gifts from Wife to Husband

Where a wife transfers property into her husband's name, a presumption of resulting trust has always applied. Thus there is no presumption of gift

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35. Falconer v. Falconer (1970) 2 All E.R. 449 (C.A.).

36. (1970) A.C. 777 at 824 (H.L.).

37. Snell, supra n.3 at 520.

38. Cousins v. Sun Life Assurance Soc. (1933) 1 Ch. 126 (C.A.).

39. Re Smith's Estate, Bilham v. Smith (1937) Ch. 636.

40. Re Collier (1930) 2 Ch. 37, a case criticized as erroneous in Cousins v. Sun Life Assurance Soc., supra n.38.

where a wife transfers shares or stock of her own either into the husband's name or into joint names,[41] purchases property with her money and places it in either her husband's name or joint names[42] or invests her money in like manner.[43] In such circumstances the onus of proving that a gift was intended lies with the husband.[44]

A different situation obtains where the wife is living with and being maintained by her husband who receives income from her property with her knowledge and consent. Unless a contrary intention can be proved there is a presumption that such income is a gift and intended to be applied for the maintenance of the family.[45] If the wife is of unsound mind the presumption may not apply.[46] Receipt by the husband of a capital sum belonging to the wife raises no presumption of gift. It was held in Heseltine v. Heseltine[47] that where the husband received such property in circumstances which precluded a gift or a loan, he was accountable as trustee to his wife and was not entitled to the benefit of any statute of limitation.

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[41] Carnegie v. Carnegie (1874) 31 L.T. 7.

[42] Grant v. Callaghan (1956) 107 L.J. 7. 105.

[43] Re Mailman (1940) 2 D.L.R. 721, affd. (1941) S.C.R. 368 (1941) 3 D.L.R. 449.

[44] Re Flamank (1889) 40 Ch. 461.

[45] Dixon v. Dixon (1878) 9 Ch. 587.

[46] Leach v. Way (1835) S L.J. 100 (Ch.), but see Howard v. Earl of Digby (1834) 2 Cl. & Fin. 634 at 657, 660, 661 (H.L.) where consent held not to be the only reason for the presumption.

[47] (1971) 1 All E.R. 952 (C.A.).

Where a wife mortgages her property to pay off the husband's debts, prima facie this is a loan[48] but the facts of the case will be the deciding factor.[49] Yet if the wife in fact loans money for her husband's "trade or business" and he becomes bankrupt or insolvent, the wife cannot claim her dividend until all the other creditors have been paid in full.[50]

"Gifts" made by a wife to her husband under the influence of the husband are not valid since a gift must be freely and voluntarily given with an understanding of the transaction.[51] The burden of proving undue influence lies on the wife[52] but the husband will be required to show that the transaction was proper where a stranger would not be required to do so.[53]

3. SAVINGS

a) Housekeeping Allowances

The cases of Blackwell v. Blackwell[54] and Hoddinot v. Hoddinot[55] established firmly the principle, in both England and Canada,[56] that where the wife effected savings out of a housekeeping allowance provided by her husband any savings therefrom belonged to the husband.[57] In Hoddinot, where the wife had successfully placed savings from the housekeepiing allowance in a football pool, Denning L. J. dissenting from the majority view, said "It may be that they belong to both jointly, because they are as much due to the wife's good housekeeping as to the husband's earnings...."[58] Khetarpal, commenting on Blackwell and Hoddinot says "...(they) took no account of the fact that any savings from the housekeeping money were as much due to the wife's skill and economy as a housewife as to her husband's earning capacity. They are not in accord with the view of marriage as a working partnership."[59]

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[48] Hudson v. Carmichael (1854) Kay 613.

[49] Paget v. Paget (1898) 1 Ch. 470.

[50] Bankruptcy Act (1914) s.36(2), replacing s.3 of the Married Women's Property Act of 1882.

[51] Willis v. Barron (1902) A.C. 271 (H.L.): Luchek v. Sitko (1956) 18 W.W.R. 611 (Alta.).

[52] Bank of Montreal v. Stuart (1911) A.C. 120 (P.C.).

[53] Re LLoyds Bank Ltd. Bonze and Lederman v. Bonze (1931) 1 Ch. 289 at 302.

[54] (1943) 2 All E.R. 579 (C.A.).

[55] (1949) 2 L.R. 406 at 416 (C.A.).

While Hoddinot is still followed in Canada, a more equitable view has prevailed in England where, by the Married Women's Property Act of 1964 it is now provided:[60]

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[56] Calder v. Calder (1971) 16 D.L.R. (3d) 369 at 374 (Ont.); Wassill v. Wassill (1951) 4 W.W.R. (N.S.) 669 (Sask.).

[57] See generally Khetarpal, supra n.3 at 47; Bromley supra n.3 at 362; Alberta Institute of Law Research and Reform, supra n.3 at 362; Samuels, The Married Women's Property Act, 1964 (1964) 108 Sol.J.287; Stone, Married Women's Property Act 1964 (1964) 27 M.L.R. 576; 19 Halsbury's Laws ss.1367-1374.

[58] (1949) 2 K.B. 406 at 415.

[59] Supra, n.3 at 48.

[60] C.19 s.1

> If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and wife in equal shares.

While the Act has been welcomed as a beginning towards the concept of partnership between spouses, as Bromley comments "... the Act has potential for working as much injustice as it avoids."[61]

In the first place, the Act only operates where the housekeeping allowance is received by the wife from the husband. In a society with an increasing number of "househusbands" this is hardly fair.[62]

The Act defines the housekeeping allowance as "expenses of the matrimonial home or for similar purposes", thus inviting the resourceful to attempt to bring within the term "similar purposes" anything from mortgage repayments[63] to football pools coupons.[64]

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[61] Supra, n.3 at 363.

[62] The Report of the Royal Commission on Marriage and Divorce, 1955, had recommended that this provision apply mutatis mutandis (Cmnd. 9678 para. 701).

[63] Tymoszczuk v. Tymoszczuk (1964) 108 Sol.J.676 where held that mortgage installments were not expenses of the matrimonial home.

[64] Pyatt v. Pyatt (1966) S.L.T. (Notes) 73 where result as in Tymoszczuk.

The Act applies to property acquired out of savings, thus giving rise to awkward questions such as whether clothes bought by the wife thereout belong in equal shares to the husband. Furthermore, on the death of a spouse, such property (often household goods) will not pass to the survivor but half will go to the deceased's personal representative since it requires a conscious act to turn a tenancy in common into a joint tenancy. Again, it is not clear whether the Act was intended to have retrospective effect.[65]

b) Savings from Other Sources

i) Pin-money

Pin-money is an allowance sometimes made by a husband to his wife for purchases for herself (often in the form of a clothes allowance). The wife is under an implied duty to apply such an allowance for the purpose for which it was given and any savings therefrom belong to the husband.[66]

ii) Proceeds from Husband's Business

Where the wife effects savings from the proceeds of the husband's business, such belong to the husband.[67]

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[65] Tymoszczuk, supra n.63 suggests that it has retrospecitve effect while Re Johns' Assignment Trusts (1970) 2 All E.R. 210 indicates the contrary view.

[66] Jodrell v. Jodrell (1845) 9 Beav.45.

[67] Pope v. Bushell & Co. (1888) 4 T.L.R. 610 (C.A.).

iii) Maintenance Payments

If husband and wife are living apart and the husband pays his wife maintenance, the position of savings therefrom depends on the intent of the parties and the circumstances of the case.[68]

iv) Investments

Where the wife invests in her name any money belonging to the husband the Married Women's Property Acts provide that such shall be transferred to the husband.[69]

4. JOINT BANK ACCOUNTS

a) The Common Purse

The income of either spouse from earnings or investments will *prima facie* remain his or her own property but problems arise when such monies are paid into a joint bank account.[70] This situation gives rise to the concept of the common purse; that while the marriage subsists both parties are free to draw on the common fund which is intended for their common use and if the account is overdrawn the debt is borne equally.[71] The difficulty exists in determining the rights of the contributors on break-up of marriage or on death. Vaisey J. in the leading case of Jones v. Maynard[72] says "I do not believe that, when once the joint pool has been formed, it ought to be, and can be, dissected ... (such) is quite inconsistent with the original fundamental idea of a joint purse or a common pool".[73]

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[68] *Birkett* v. *Birkett* (1908) L.T. 540 and see *Logan* v. *Logan* (1920) S.C. 537.

[69] (1882) 45 & 46 Vic. c.75 s.10; R.S.M. (1970) c.M70 s.8; R.S.B.C. (1960) c.233 s.24; R.S.N.B. (1952) c.140 s.7; R.S.Nfld. (1963) c.227 s.12; R.S.O. (1970) c.262 s.12; R.S.P.E.I. (1951) c.92 s.13; R.S.S. (1965) c.340 s.6.

[70] See generally *Cullity*, *supra* n.3 at 264; *Khetarpal*, *supra* n.3 at 51; *Bromley*, *supra* n.3 at 360; *Alberta Institute of Law Research and Reform*, *supra* n.3 at 36; 19 *Halsburys Laws*, *supra* n.57 s.1360 Samuels, *The Joint Matrimonial Banking Account and Its Proceeds* (1965) 28 M.L.R. 480; Willis, *The Nature of a Joint Account*, (1936) 14 Can.Bar.Rev. 457.

b) Relationship Between Bank and Clients

The customary contract in the case of joint accounts is that each joint holder may deposit or withdraw and on the death of one spouse the balance belongs to the other. This contract is effective between the bank and the joint clients but a more complicated situation obtains as between the joint holders.

c) Where One Spouse Contributes to the Joint Account

If the husband is the sole contributor to the joint account, the presumption of advancement will operate to give the wife a prima facie interest.[74] But the presumption can be rebutted, for example, where it can be shown that the joint names was a matter of convenience to enable the wife draw cheques for housekeeping.[75] The intention of the parties is to be divined from the circumstances.[76] However, where a joint account was opened for convenience, but later the contributing spouse formed the intention that the other should have beneficial rights, the change of intent will be recognized.[77]

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[71] Re Shaw (1906) 94 L.T. 93.

[72] (1951) Ch. 572.

[73] Id. at 575.

[74] Bromley, supra n.3 at 361.

The force of the presumptions of advancement and resulting trust is on the wane in England, as has been noted earlier.[78] In Canada, however, it was held in Warm v. Warm[79] that where money was withdrawn from the joint account to purchase property and the title placed in the name of the withdrawer, the legal title should be held in trust for both jointly - in the absence of a contrary intention. Where the wife is the sole contributor to a joint account there is a presumption of a resulting trust in her favour.

d) Where Both Spouses Contribute to the Joint Account

Where both spouses have contributed to the joint account the law as to how the balance should be divided is still uncertain. In Jones v. Maynard,[80] where the husband withdrew money from the joint account into which both had contributed and bought shares therewith, it was held that the wife was entitled to a half share in the investments. But in Re Bishop,[81] where both had contributed and both had withdrawn money with which they bought securities, the court found that there was no real intention to pool resources, therefore the securities in the wife's name belonged to the wife and those in the husband's name belonged to him. The underlying principle in this case was that where either spouse could draw cheques on a joint account without restriction, each drew with the authority of the other and any property bought therewith belonged to the one in whose name the purchase was made: thus there was no equity in the other spouse to displace the legal ownership of the purchasing spouse.

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[75] Harrods v. Tester (1937) 2 All E.R. 236 (C.A.); Heseltine v. Heseltine (1971) 1 All E.R. 952 (C.A.); Marshall v. Crutwell (1875) L.R. 20 328 (Eq.).

[76] Re Harrison, Day v. Harrison (1920) 90 L.J. Ch. 186.

[77] Re Figgis, Roberts v. McLaren (1969) 1 Ch. 123.

[78] Supra n.35. See also Falconer v. Falconer (1970) 3 All E.R. 449 (C.A.); Pettitt v. Pettitt C.A. 777 at 824 (H.L.).

[79] (1969) 70 W.W.R. 207 (B.C.S.C.).

[80] (1951) Ch. 572.

In Re Bishop Stamp J. rejected Jones v. Maynard and equal sharing on the grounds, *inter alia*, that this would work hardship on the husband since the principle would not apply *mutatis mutandis* if the property were purchased in the name of the wife; furthermore, the wife must be taken to have impliedly consented to the transaction. It therefore appears that where incomes are pooled and placed in a common fund, both acquire a joint interest in the whole fund unless a contrary intent can be shown.

e) Survivor's Rights

On death the balance of the joint fund will accrue to the survivor unless a contrary intent can be shown.[82] The Canadian view has been that the survivor obtained a joint legal interest in the chose in action with an immediate beneficial interest which was not to fall into possession until the other's death.[83] The trend in Canada is, therefore, that survivorship will be recognized as a possibility in all cases of joint accounts but where only the depositor has operated the account in his lifetime, the court will require strong evidence of intent to create a survivorship interest.[84]

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[81] Re Bishop, National Provincial Bank Ltd. v. Bishop (1965) Ch. 450.

[82] Id.

In general, the English courts take the view that where marriage ends in death, a joint tenancy with right of survivorship is appropriate but where it ends in divorce a tenancy in common is appropriate. As Samuels says, "... the presumption of a beneficial joint tenancy in amity, and a beneficial tenancy in common in acrimony is the only logical, realistic and fair presumption to apply in an age where marriage is rightly looked upon as an equal partnership."[85]

5. CONCLUSIONS

The relevance, and hence the importance, of the presumptions of advancement and resulting trust are undoubtedly decreasing. But it is submitted that, despite the increasing number of wage-earners among married women, there is still a large segment of that class who, through force of domestic circumstances, or traditional outlook, or innate lack of business acumen, are still entirely dependent on their husbands in financial matters. It is submitted therefore that, until such time as matrimonial property law is reformed so as to recognize the marriage partnership principle, the equitable presumptions still have a useful place in our society.

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[83] Re Reid (1921) 64 D.L.R. 598 (Ont. S.C.A.D.): Edwards v. Bradley (1956) 2 D.L.R. (2d.) 382 (Ont. C.A.).

[84] Cullity, supra n.3 at 270.

[85] Supra n.70 at 482.

It is further submitted that in the matter of savings from a housekeeping allowance it is an outrageous thing that in Canada today an industrious and provident housewife or househusband cannot consider as her or his own earnings any savings made thereout. It is therefore suggested that remedial legislation be sought in Canada which, with the advantage of the English experience in this matter, would be less ambiguous and more fair than the English reform of 1964.

CHAPTER FIVE THE MATRIMONIAL HOME

1. THE PROBLEM

It may be said that in general there never has been any systematic development of family property law.[1] Thus despite the increasing need therefor, there are no special rules available to apply to the problems of ownership of family assets - in particular, the most important, the matrimonial home.

The Law Reform (Married Women and Tortfeasors) Act of 1935, as has been seen,[2] finally established the principle of separation of property between husband and wife. As an incident of legal history, equal status with men for married women in matters of private law and civil procedure was linked together with separate property rights, although these matters were essentially distinct. And so the rigid enforcement of a separation of property doctrine has imposed great problems on the courts when the marriage has broken down and a division of property is required - how to maintain consistency between the separation of property doctrine and the principle of equality between spouses. As Kahn-Freund has remarked "... very frequently their money and goods are mingled so inextricably that an appropriation of assets to one spouse or the other becomes a game in which the element of hazard exceeds that of arithmetical skill."[3]

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[1] Excepting the law relating to intestate succession.

[2] *Supra* Chapter Two.

[3] *Matrimonial Property - Some Recent Developments* (1959) 22 M.L.R. 241 at 242.

In the leading case of Pettitt v. Pettitt[4] the House of Lords affirmed that the property rights of spouses must be determined according to the general property law. This state of affairs is seen to be highly unsatisfactory because of the uncertainty as to title which results, because the outcome so often depends on the discretion of the court, and because of the unfairness which often appears to attend decisions.

The state of the law on this issue will now be looked at both in England and Canada, as will the proposals thereon of the more important reforming agencies.

2. OCCUPATIONAL RIGHTS

a) In England

The common law position[5] concerning the right to occupy the matrimonial home was that where the legal and equitable title was in the husband, the wife could claim the right to occupation by virtue of her right to her husband's consortium and her right to be maintained by him: the husband discharged his obligations by providing the home. Thus, if the wife were deserted she was entitled to remain in the matrimonial home, unless she had forfeited her right to maintenance.[6] Conversely, if the legal and equitable title were in the wife, her duty to cohabit gave the husband the right to occupy the matrimonial home.

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[4] (1970) A.C. 777 (H.L.).

[5] Bromley, Family Law 386 (4th ed. 1971); Snell's Principles of Equity 526 (27 ed. Megarry and Baker 1973); Cullity, Property Rights During Marriage in Mendes Da Costa (ed.) 1 Studies in Canadian Family Law 255 (1972).

[6] For example, by adultery, Boyt v. Boyt (1948) 2 All E.R. 436.

The right of both spouses to occupation was irrevocable as long as the marriage subsisted[7] but the right was extinguished, together with the right to consortium and maintenance, when the marriage was dissolved or annulled.[8]

Where there was a joint tenancy or tenancy in common, each spouse had an equal right to possession and the right not to be evicted without a court order. While the courts were slow to deprive either spouse of use of the home,[9] they had the discretion under section 17 of the Married Women's Property Act of 1882, to control the right of either spouse to possession. But such action on the part of the courts would be a temporary measure; the trust for sale would be implemented to enable the parties realise their capital.

The right of the deserted wife to remain in the matrimonial home or the notion of the "deserted wife's equity", was examined by the courts in the leading case of National Provincial Bank Ltd. v. Ainsworth.[10] In this case the husband had deserted and conveyed the home to a company which then charged it to the Bank to secure a loan. The company failed to repay and the Bank claimed possession of the home whereupon the wife unsuccessfully attempted to set up her "deserted wife's equity". It was held that she could only do so where the sale by the husband had been a sham transaction aimed at securing possession.[11] The House of Lords agreed that the so-called "equity of a deserted wife to occupy the matrimonial home" had never existed; that the wife's right was purely personal and did not bind a purchaser, mortgagee, trustee in bankruptcy or third party.

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[7] Even where the wife had obtained an order relieving her of the duty to cohabit, Halden v. Halden (1966) 1 W.L.R. 1487.

[8] Vaughn v. Vaughn (1953) 1 All E.R. 209 (C.A.) where held that where there was an agreement to the contrary, the spouse could remain.

[9] Hall v. Hall (1971) 1 All E.R. 762 (C.A.) where held that unpleasantness, tension and inconvenience were not enough. For a discussion of the situation where a spouse seeks to evict the other spouse, see Hoggett, Family Crises and the Problem of Accommodation (1974) 118 Sol. J. 470.

[10] (1965) 2 All E.R. 472 (H.L.). For an attack on the concept of the "deserted wife's equity" see Megarry, The Deserted Wife's Right to Occupy The Matrimonial Home (1952) 68 L.Q.R. 379.

Difficulties thus arose in attempting to balance the claims of the deserted wife and that of the purchaser (usually the husband's creditor). The wife's right against the purchaser was no greater than her right against her husband; she would still lose it on adultery or being offered alternative accommodation. This situation also made it difficult for a prospective purchaser to determine his rights and it was sought to overcome these difficulties, to protect both wife and purchaser, by The Matrimonial Homes Act of 1967.[12] This Act, which does not depend on desertion, provides that the wife's right to occupy the matrimonial home shall be a charge on the husband's estate or interest in the property; a right which normally will subsist only during coverture and will end on the husband's death or dissolution of the marriage.[13] The spouse with no proprietary rights is given "rights of occupation" so that, if in occupation, there is a right not to be evicted without a court order, and if not in occupation, a right to enter and occupy with leave of the court.[14] The same rights exist for a husband mutatis mutandis. The spouses' statutory rights of occupation are registrable and on registration bind successors in title.[15]

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[11] In Ferris v. Weaver (1952) 2 All E.R. 233 it was held that where the husband sought to obtain possession (which he could not otherwise get) through a purchaser, the purchaser had no greater right than the husband.

[12] C.75 as amended by The Matrimonial Proceedings and Property Act, (1970) c.45 s.38. The Act came into effect on the husband's acquisition of the property, on the date of marriage or commencement of the Act, whichever last happened. For a detailed account of the Act see Samuels, The Matrimonial Homes Act, 1967 (1967) 111 Sol. J. 818; Rose, Matrimonial Homes Act 1967 (1967) 117 (2d.) N.L.J. 824; Nance, Interpreting Matrimonial Homes Act, 1967 (1967) 117 (2d.) N.L.J. 1360.

The weakness of the Matrimonial Homes Act[16] lies in the fact that it will only offer effective protection when automatic registration of a statutory right to occupy becomes common practice, for when the marriage breaks down the property may already be mortgaged and registration too late. Furthermore, after the death of the owner-spouse the occupation of the matrimonial home is out of the hands of the courts unless the marriage had broken down. Another drawback is that the Act does not extend to local authority tenancies - where the spouses most often in need of protection are to be found. It is thus clearly seen that the Matrimonial Homes Act is not a complete answer.

While it has been held that an owner-spouse cannot be turned out of the home unless the other spouse can prove exposure to molestation,[17] more recent cases show that it is not necessary for a wife to prove physical assault or reasonable apprehension thereof before obtaining an order expelling the husband from the matrimonial home and that preference will be given to the spouse looking after the children.[18]

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[13] The Matrimonial Homes Act (1967) c.75 s.2 as amended.

[14] Id. s.1(1).

[15] Id. s.2(3).

[16] For criticism of the Matrimonial Homes Act see Kahn-Freund, Law Commission: Published Working Paper No. 42: Family Property Law 1971 (1972) 35 M.L.R. 403 at 405; Kahn-Freund, Recent Legislation on Matrimonial Property (1970) 33 M.L.R. 601 at 609; Stone, Statutes (1968) 31 M.L.R. 305; Nance, Spouse's Occupation (1969) 119 N.L.J. 1087.

That uncertainty still remains in the matter of possession was demonstrated in a recent case where a wife, whose husband was the tenant of the home, applied under the 1967 Act for an order requiring her husband to vacate and the House of Lords held that the authority to regulate the husband's power of possession did not give the court power to order him out of the home; the implication being that the common law did not enable the courts to do so.[19]

b) In Canada

In all common law provinces of Canada the wife's rights concerning occupation of the matrimonial home are affected by dower or homestead legislation.[20]

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[17] Maynard v. Maynard (1969) P.88.

[18] Hall v. Hall (1971) 1 All E.R. 762; Phillips v. Phillips (1973) 2 All E.R. 423; Bassett v. Bassett (1974) reported in (1975) 5 Fam. Law 90. See also Cretney, Excluding Husband from Home (1971) 121 N.L.J. 376.

[19] Tarr v. Tarr (1972) 2 All E.R. 295.

[20] On dower and homestead legislation see Bowker, Reform of the Law of Dower in Alberta (1955-61) 1 Alta. L.R. 501; Institute of Law Research and Reform, Matrimonial Property Working Paper 50 (1974); Ontario Law Reform Commission, 1 Property Subjects 105 (1967); Auld, Matrimonial Property Law in the Common Law Provinces of Canada in Friedmann (ed) Matrimonial Property Law 259 (1955).

At common law the wife on the death of her husband obtained a life interest in one-third of her deceased husband's lands.[21] While dower was abolished in England in 1925 the older provinces of Canada which had inherited dower provisions retained them.[22] The western provinces, borrowing the concept of homestead legislation from the United States, passed "Dower" Acts which were in effect homestead acts.[23] While the detailed provisions vary from province to province, there are three basic features to homestead legislation:

a) The husband who owns the matrimonial home may not dispose of it, or encumber it, without the consent of his wife or without a court order dispensing with such consent.

b) On the death of the husband, the wife may continue in occupation.

c) Such property is exempt from sale under execution.

It is to be noted that this legislation does not give the wife an express right to live in the matrimonial home but there is an implication that such a right exists.

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[21] The husband had a reciprocal right - tenancy by the curtesy.

[22] For example The Dower Act R.S.O. (1970) c.135.

[23] R.S.A. (1970) c.114; R.S.B.C. (1960) c.175; R.S.M. (1970) c.D-100; S.S. (1915) c.29. It is to be noted that in Manitoba there is a reciprocal provision to give the husband the same rights where the homestead is owned by the wife [s.33(1)], and in Alberta the Act applies to "married persons".

To those provinces without homestead legislation the decision in National Provincial Bank Ltd. v. Ainsworth[24] is still of considerable significance. The chief conclusions and reasoning of the House of Lords could be summarized as follows:

a) Section 17 of the Married Women's Property Act of 1882 does not create new proprietary interests and the discretion conferred is limited to proceedings between spouses.

b) There is no useful analogy between a (deserted) wife and a contractual licensee. The wife's right to occupation is purely personal arising from her right to support and cohabitation - not through any permission or license from the husband.

c) Third parties cannot be bound by mere equities which are not coupled with an interest in land.

d) The fact that the wife's "equity" did not arise on marriage but only on desertion gave rise to acute conveyancing problems: intending purchasers should not have to enquire into the state of the vendor's marriage and the conduct of the parties.

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[24] (1965) A.C. 1175 (H.L.).

As Lord Wilberforce said:[25]

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumptions by third parties, and have some degree of permanence or stability. The wife's right has none of these qualities, it is characterized by the reverse of them."

It appears that the Canadian courts have not yet had to face the issue of whether or not to completely espouse the reasoning and decision of the House of Lords in National Provincial Bank Ltd. v. Ainsworth. There have been few cases involving third party rights. However, rejected in that case was the reasoning of the English Court of Appeal in Bendall v. McWhirter,[26] where it was held that a deserted wife had an irrevocable authority from her husband to remain in the matrimonial home until the court ruled otherwise, reasoning which the Supreme Court of Ontario approved in Carnochan v. Carnochan.[27] There are thus indications that the Canadian Courts may not follow the House of Lords on this issue but Cullity is of the view that:[28]

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[25] Id at 1247. For a detailed discussion see Cullity, supra n.5 at 207; Kahn-Freund, Once Again - The Matrimonial Home (1955) 18 M.L.R. 412.

[26] (1952) 2 Q.B. 466 (C.A.).

[27] (1954) 1 D.L.R. 87 (Ont. H.C.), affd. (1954) 4 D.L.R. 448 (C.A.), affd. (1955) 4 D.L.R. 81 (S.C.C.).

[28] Supra n.21 at 218.

> "In Canada, it seems likely that the strength and unanimity of the reasoning in National Provincial Bank Ltd. v. Ainsworth together with the fact that no Canadian judge has given explicit approval to the view that the rights of the deserted wife will prevail against third parties with notice, may lead to eventual acceptance of the decision."

A recent case in support of Cullity's view is Beauchamp v. Beauchamp[29] which appears to follow Ainsworth but in this case it is made clear that the law is by no means certain.

If Canada does follow the House of Lords on this matter a wife who has not forfeited her right to support will only be evicted from the matrimonial home by court order but her rights, being purely personal, will not prevail against those of her husband's successors in title. While she may seek an injunction restraining her husband from dealing with the property to the prejudice of her marital rights, if she has been offered suitable alternative accommodation the courts will not interfere with the husband's disposition.

In recent Ontario cases where the home was jointly owned the court, exercising its discretion, gave the wife possession where the husband had ill-treated her[30] and in another case where the wife deserted the husband, the latter was held to have the right to remain in the home.[31]

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[29] (1972) 6 R.F.L. 43.

[30] Iachetta v. Iachetta (1973) 11 R.F.L. 309.

[31] Maskewycz v. Maskewycz (1974) 44 D.L.R. 180.

It is difficult to assess the wife's right to possession of the matrimonial home in connection with matrimonial proceedings such as divorce, judicial separation or alimony. Neither the Divorce Act[32] nor, for example, the Domestic Relations Act[33] in Alberta make express provision for the granting of orders of possession. However, the Divorce Act, under section 10(c), enables, the court "to relieve either spouse from the obligation to cohabit" and under section 12 to impose conditions under such circumstances. Restraining or non-molestation orders are thus granted, regardless of who owns the home, thus giving a spouse possession.[34] After divorce, the wife's right to occupy the matrimonial home appears to come to an end.[35]

It is suggested that pending the introduction of a matrimonial property regime, those provinces without homestead legislation should introduce legislation to provide a non-owning spouse with rights of occupation in the matrimonial home similar to those enjoyed by such spouses in England. Hopefully lessons would have been learned from the English experience so that more effective legislation would be drawn up in the provinces concerned.

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[32] R.S.C. (1970) c.D-8.

[33] R.S.A. (1970) c.113.

[34] For example, Feldman v. Feldman (1971) 14 D.L.R. (3d) 222. But see Duggan v. Duggan (1965) 51 D.L.R. (2d) 576 where a wife seeking a restraining order pending trial of an alimony action, was refused on the ground that since the husband was a co-owner he could not be treated as a stranger.

[35] Perkins v. Perkins (1972) 9 R.F.L. 349.

3. PROPERTY RIGHTS

a) In England

i) The Doctrine of Separation of Property

The vexed question of a spouse's proprietary rights in the matrimonial home results from a rigid adherence to the doctrine of separation of property between spouses and a rejection of the idea of community property. As one writer puts it:[36]

> "The general theory of many modern systems of marital property is that the spouses eat the same bread and share the uneaten bread. Separation of property is different. There each breadwinner keeps his or her uneaten bread."

But what if the uneaten bread of one was wholly or partly acquired through the efforts of the other?[37]

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[36] Baxter, Report of Committees (1974) 37 M.L.R. 177.

[37] See generally Lesser, The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot (1973) 23 U of T L.J. 148; Bromley, supra n.5 at 356; Snell, supra n.5 at 521; Khetarpal, Property Rights of Husband and Wife: A Brief Survey (1969) Alta. L.R. 52; Alberta Institute of Law Research and Reform, Matrimonial Property: Working Paper (1974); Ontario Law Reform Commission; Report on Family Property Law (1974); The Law Commission: (Law. Com. No. 52) First Report on Family Property: A New Approach (1973); Kahn-Freund, Matrimonial Property - Some Recent Developments (1959) 22 M.L.R. 241; Kahn-Freund, Recent Legislation on Matrimonial Property (1970) 33 M.L.R. 601; Kahn-Freund, Once Again - The Matrimonial Home (1955) 18 M.L.R. 412; Hahlo, Matrimonial Property Regimes (1973) 11 OS. L.J. 455; Miller, Family Assets (1970) 86 L.Q.R. 98; Brown, English Law in Search of a Matrimonial Regime (1970-71) 4 Ottowa L. Rev. 331.

For a comparative study see Glendon, Matrimonial Property: A Comparative Study of Law and Social Change (1974) 49 Tul. L. Rev. 21.

ii) The Equitable Presumptions and the Doctrine of Family Assets

The chief criteria used by the courts, prior to the watershed of Pettitt v. Pettitt,[38] in determining the property rights of spouses when not evident, were the equitable presumptions of advancement and resulting trust. Where property was purchased in the name of another, or in joint names, there arose a presumption of a resulting trust in favour of the purchaser:[39] similarly on a voluntary conveyance of transfer of real or personal property.[40] In either case the presumption could be rebutted by evidence of intent to make a gift and in certain relationships, such as husband and wife, the presumption of advancement would rebut the presumption of resulting trust[41] - in the absence of evidence to the contrary.

And so in matrimonial disputes where there was no express agreement as to the division of matrimonial property the doctrine of resulting trust was invoked in order to recognize joint contributions, direct and indirect, as establishing equal interests in the matrimonial home regardless of who held the legal title. This was in fact an application of "family assets" doctrine, the implied pooling of resources, the joint venture. Lord Denning in particular, as shall be seen, recognized the wife's contribution as housekeeper and use of her savings as contributing to the acquisition of the matrimonial home so that she thereby acquired a beneficial interest therein. But there is a limit to which even the most enlightened judges can bend the legal rules in order to meet changing social conditions and the demand for fair treatment; the consensus is that reforming legislation alone can effect the radical changes required.

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[38] (1970) A.C. 777 (H.L.).

[39] Dyer v. Dyer (1788) 2 Cox Eq. 92 (Ch.).

[40] Niles v. Lake (1974) 2 D.L.R. 248 (S.C.C.).

[41] See Earnshaw, Presumption of Advancement (1971) 121 N.L.J. 96, 120 Ellis, Advancement of an Intended Wife (1975) 119 Sol. J. 108.

iii) Modern Judicial Decisions

Where property was purchased by one spouse and conveyed into his or her name, or purchased by both and conveyed into joint names, there would normally be no problem. It was otherwise where the circumstances varied. Where the property was held in the wife's name, the husband who paid off an encumbrance thereon, was held entitled to a share of the property.[42] The husband who partly financed the purchase of the matrimonial home conveyed to the wife was able to rebut the presumption of advancement and claim an interest therein;[43] although the presumption would hold where it was shown that a gift had been intended.[44]

If both husband and wife had contributed to the purchase of property which was then conveyed to either of them, it was agreed that "equality was equity" and that the property belonged to both in equal shares - in the absence of evidence indicating an unequal apportionment.[45] But Lord Justice

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[42] Outram v. Hyde (1895) 24 W.R. 268.

[43] Fish v. Fish (1966) 110 Sol. J. 228 (C.A.).

[44] Silver v. Silver (1958) 1 All E.R. 523 (C.A.).

[45] Rimmer v. Rimmer (1953) 1 Q.B. 63 (C.A.); Fribance v. Fribance (1957) 1 All E.R. 357 (C.A.).

Denning said[46]

> "... the joint assets doctrine can only have application where there is fair inference that parties had no intention to hold the property in definite shares: the court must then attribute an intention."

In Rimmer v. Rimmer Lord Justice Romer said:[47]

> "... cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property."

Again, where the husband held a lease on the matrimonial home on trust for himself and his wife and then purchased the freehold reversion he could not claim that the wife's interest was limited to the leasehold.[48]

A more difficult problem to resolve was where the contribution of the non-owner spouse was of an indirect nature; when it took the form of services rather than money. Thus, in cases where the wife gave unpaid help in the husband's business, property bought with the proceeds was held to belong to them in equal shares.[49] That "equality is equity" was also held in other cases of indirect contribution where the wife worked and contributed to the household expenses.[50]

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[46] Fribance v. Fribance, id, at 359.

[47] (1953) 1 Q.B. 63 at 69.

[48] Protheroe v. Protheroe (1968) 1 All E.R. 1111 (C.A.).

[49] Nixon v. Nixon (1969) 3 All E.R. 1133 (C.A.); Muetzel v. Muetzel (1970) 1 All E.R. 443 (C.A.).

Where a husband incurred expenditure in effecting improvements to the property of his wife, the law was that the burden of proving a consequent interest in the property lay with the husband;[51] although he could not claim for improvements where he received the rents and profits.[52] And in a more modern case, where a husband gave up work to make a major conversion to his wife's property, he was held to have acquired an interest.[53]

iv) The Resulting Trust Prevails

The decisions above referred to were not in accord with traditional property law principles, however, and in the leading case of Pettitt v. Pettitt[54] the law took a different turn.

This case concerned the claim by the husband in proceedings under section 17 of the Married Women's Property Act of 1882 to a beneficial interest in the former matrimonial home, held in his wife's name, by reason of certain improvements he had effected thereto. The Court of Appeal had affirmed the original ruling that the husband was entitled but this decision was reversed by the House of Lords who held that section 17 of the

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[50] Ulrich v. Ulrich and Felton (1968) 1 All E.R. 67 (C.A.); Chapman v. Chapman (1969) 3 All E.R. 476 (C.A.).

[51] Campion v. Cotton (1812) 17 Ves. 263.

[52] Niles v. Cooper (1846) 9 Beav. 294.

[53] Jansen v. Jansen (1965) 3 All E.R. 363 (C.A.).

[54] (1970) A.C. 777 (H.L.).

1882 Act was a procedural section only and did not empower the court to override vested proprietary interests: furthermore, upon the facts disclosed, it was not possible to infer any common intention that the husband's work should win him a beneficial proprietary interest therefore no such interest could accrue.

Views expressed by their Lordships on matters relating to the central issue have since been the subject of considerable controversy. Firstly, it was said in Pettitt v. Pettitt that a spouse doing work or expending money on the property of the other derives no claim as a result, in the absence of agreement,[55] and that a wife, by devoting herself exclusively to the management of the home and family, did not thereby acquire an interest in the matrimonial property held in the husband's name.[56]

Secondly, it was said that since English law acknowledges no community of property, if one spouse buys property for common use this cannot per se give the other a proprietary interest;[57] the title to such property must be determined on ordinary property law principles as they would apply to strangers.[58]

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[55] Id. at 796, 804, 807.

[56] Id. at 811 per Lord Hodson who, noting the inherent injustice of the situation that "the cock can feather the nest because he does not have to spend most of his time sitting in it" suggests that the imbalance is corrected by the husband's liability to maintain the wife.

[57] Id. at 817, 818 per Lord Upjohn "... the expression 'family assets' is devoid of legal meaning...."

[58] Id. at 811.

Fourthly, it was said that on marriage breakdown the courts must try to determine the intention of the parties which they can only infer from the parties' conduct at the time. But while the court can impute to the parties an intent they may never have had, it cannot impute an agreement they may never have made; "the court does not devise or invent a legal result."[60]

Fifthly, it was generally agreed[61] that the equitable presumptions, relating as they did to the propertied classes around the turn of the Century when marriage settlements were common and wives rarely contributed to the family income through earnings, no longer related to our "real-property-mortgaged-to-a-building-society-owning democracy".[62]

Lesser points out[63] that the reasoning in the House of Lords failed to distinguish between the doctrine of family assets in the sense of acquisition through indirect contributions, and automatic community of assets so that the position on this point is still in doubt. He then poses the question as to whether the earlier Court of Appeal decisions which favoured the doctrine of family assets still stood since the doctrine was not directly overruled.

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[60] Id. per Lord Morris of Borth-y-Gest at 804.

[61] Lord Upjohn to the contrary.

[62] (1970) A.C. 777 at 824 per Lord Diplock. Some of the Law Lords favoured imputing a reasonable intention as a substitute for the presumptions but the majority did not accept adoption of this technique.

[63] Supra, n.37 at 179.

v) The Discretion of the Court

It is useful to introduce at this point a few remarks on Section 17 of the Married Women's Property Act of 1882. It says:

> In any question between husband and wife as to the title to or possession of property, either party ... may apply by summons or otherwise in a summary way ... and the judge may make such order with respect to the property in dispute ... as he shall think fit....

The application of this section has been extended in order to apply up to three years after divorce,[64] and, where a spouse has in his control or possession property in which the other had a beneficial interest, the court's jurisdiction has been extended to property or money representing the original property.[65]

Whereas in Newgrosh v. Newgrosh[66] it was said that "the judge has wide power to do what is fair and just", it was subsequently established in Pettitt that the court, under this section, had no jurisdiction to confer or vary existing titles and no wider power to transfer or create interests than it would have in other types of proceedings: at most it had "a wide discretion as to the enforcement of the proprietary or possessory rights of one spouse in any property against the other."[67]

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[64] The Matrimonial Proceedings and Property Act 1970 s.39.

[65] Matrimonial Causes (Property and Maintenance) Act 1958 s.9(1)-(3).

[66] (1950) 100 L.J. 525.

[67] (1970) A.C. 777 at 820 per Lord Diplock.

In the recent case of Bothe v. Ames[68] the Court of Appeal made clear that in an application under Section 17 the judge had the authority to assess the value of the property and the parties' respective monetary shares therein. It now appears, therefore, that there are two types of cases where the court will have discretion in an application under Section 17; where both contribute the court can decide in what shares the property should be divided, and the court may control (the way in which the property is to be used.

As will be later seen,[69] however, the parties, rather than invoking Section 17, may now make extensive use of the discretionary powers of property adjustment on marriage breakdown now contained in the Matrimonial Causes Act of 1973.[70] These powers have been described as "... so all-embracing that when all appropriate orders have been made, the result may be to distribute all the property owned by both spouses among them and their children."[71] These provisions apply on the granting of a decree of divorce, nullity or judicial separation "or at any time thereafter",[72] and apply to either spouse.

Cretney suggests[73] that proceedings under Section 17 are not often appropriate for spouses after marriage breakdown and that the 1973 Matrimonial Causes Act is a more appropriate vehicle. He suggests that a successful claim under Section 17 might well drastically reduce the amount which might otherwise be ordered under a discretionary property adjustment under the 1973 Act.[74] It would therefore seem that where divorce is not sought but the parties are living apart, application should be made under Section 17 but it is to be remembered that the court will only be able to give effect to the strict legal and equitable rights of the parties.

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[68] The Times, January 25, 1975.

[69] Wachtel v. Wachtel infra n.87.

[70] Ss. 22 and 25 replacing ss. 4 and 5 of the Matrimonial Proceedings and Property Act of 1970.

[71] Harnett v. Harnett (1973) Fam. 156 per Bagnall J. at 160.

[72] Matrimonial Causes Act 1973 s.4, 24.

[73] The Matrimonial Home After Wachtel (1974) 118 Sol. J. 431.

vi) Statutory Reform

As has been seen, section 17 of the Married Women's Property Act of 1882 was largely circumvented by the Matrimonial Proceedings and Property Act of 1970, as was the limited effect placed on the section by the decision in Pettitt. The courts have thus been given discretionary power, in an action for divorce, nullity or judicial separation, to effect a redistribution of matrimonial property. This Act also lays down the criteria to be used by the courts in any transfer or settlement of property and provides that the parties should be placed in the same position as if the marriage had not broken down.[75]

The question of improvements made by a spouse to the property of the other spouse, the issue in Pettitt was dealt with by section 37 of the 1970 Matrimonial Proceedings and Property Act which provided:

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[74] See Hunter v. Hunter (1973) 1 W.L.R. 948 at 961.

[75] C.45 ss.4, 5; Ss. 4 and 5 have been repealed and re-enacted as ss.24 and 25 of the Matrimonial Causes Act 1973.

> It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary, express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises....

It is to be noted that this section applied in addition to property other than the matrimonial home and since the contribution may also be in money's worth, work done by a spouse will count. In addition it should be noted that the contribution must be substantial, that it is not confined to cases arising out of section 17 but that it is confined to improvements to property.

Difficult questions arising from the construction of section 37 have been posed by Lesser, some of which are:[76]

- When is a contribution substantial?
- How is existence of agreement to the contrary to be tested? are both inferred and imputed agreements covered by "implied agreement"?
- In the absence of agreement as to the size of an interest, what criteria are to be used to determine a 'just' quantification?
- Which factors taken into account under section 4 can be taken into account under section 37?

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[76] Supra n.37 at 188.

It can thus be seen that while this particular piece of remedial legislation will help to redress the former cause of grievance, it is by no means a complete answer to the problem.

vii) The Trust Concept Reaffirmed

In Gissing v. Gissing[77] the husband was the legal owner of the matrimonial home and the wife on marriage breakdown claimed a beneficial interest therein on the ground of her contribution in the form of furniture, clothing and household equipment. The issues were, did the wife's contribution entitle her to an interest and, if so, what was the size of that interest. The Court of Appeal had held[78] that the wife's contribution did give rise to a beneficial interest in the matrimonial home but this decision was overruled by the House of Lords who held that the contribution was not sufficiently substantial to create a beneficial interest.

The House of Lords criticized the Court of Appeal's use of the concept of "family assets". and it was of the view that there had been an excessive application of the maxim "equality is equity".[79]

The Lords' approach heretofore had been that, in the absence of express agreement, whether a beneficial interest arose through indirect contributions towards the purchase of the house depended on the doctrine of resulting trust, and the judgments in Gissing clearly established that the judicial basis for the right claimed, in the absence of express contract, was the trust concept.

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[77] (1971) A.C. 886 (H.L.). On Gissing see Lasok, Working Wife's Share in the Matrimonial Home (1969) 119 N.L.J. 279, and Lesser, supra n.37 at 188.

[78] (1969) 1 All E.R. 1043.

[79] See Brown, supra n.37 at 338, where he discusses the Court of Appeal's leaning towards 'Palm Tree' justice: "No one can blame the judge if, in the midst of this legally unchartered jungle, he looks for the nearest tree beneath which to dispense justice".

But their Lordships were not ad idem as to the circumstances under which a resulting trust would arise. Departing from the traditional view of the resulting trust, some were of the view that the trust only arose when and because the legal owner had accepted the contribution; the trust was then "imposed".[80] The reasoning behind this view was that a spouse, by contributing indirectly, had earned an interest and that a reasonable owner-spouse would only accept the contribution on the understanding that it would generate an interest. Others held the view that a trust arose in these circumstances because equity would not countenance enrichment of the legal owner at the expense of the contributor.

Concerning quantification of the joint interest, the view in Rimmer v. Rimmer,[81] that there should, in the absence of contrary agreement, be division in equal shares regardless of the size of the contribution, was rejected. The principles were established in Gissing v. Gissing that if the claimant made a direct contribution to the purchase price of the matrimonial home, the interest thereby acquired would normally be proportionate to the ratio between the contribution and the total cost of the property; and where the contribution was indirect, half-shares would not automatically result.

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[80] This view appears to be a compromise between the view that such a beneficial interest is acquired as a matter of law and the view that it be acquired as a matter of agreement.

[81] (1953) 1 Q.B. 63.

As has been noted, Lesser has criticized the House of Lords for failing to distinguish between the doctrine of family assets in the sense of acquisition through indirect contributions on the one hand and through automatic community of assets principles on the other, thus leaving the general doctrine still in doubt.[82] He pointed out that the Court of Appeal's decisions favouring the doctrine of family assets had not been directly overruled and possibly still stood. Lesser suggested that at this point the position was that, in the absence of express agreement, the court must examine the conduct of the spouses during the period of acquisition in order to discover any intention that the non-owner should acquire an interest and if no such interest could be inferred, the court had no power to impute such an intention and the legal title would be conclusive. If such an intention could be shown, then a trust would he held to have arisen therefrom and the spouses would be equitable tenants in common, either in proportion to their contributions or in equal shares.[83]

viii) Recent Judicial Decisions

After Gissing, the law concerning the possibility of a beneficial interest in the matrimonial home arising from indirect contributions to the purchase thereof has been uncertain. It appears that such an interest is possible where it can be shown that the indirect contribution was instrumental in the acquisition of the home, for example by freeing the owner-spouse's money to make the mortgage payments; but the contribution must be substantial. A look at the subsequent cases may (or may not) clarify the present position.

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[82] Lesser supra n.37 at 179.

[83] Lesser supra n.37 at 196. As to circumstances under which sale will be ordered on application under S.17 of the 1882 Act, see Burke v. Burke (1973) (C.A.) reported in 118 Sol. J. 98; Brown v. Brown (1974) (C.A.) reported in 119 Sol. J. 166.

In *Falconer* v. *Falconer*,[84] Lord Denning said that *Gissing* having been overruled only on the extent of the wife's contribution, the previous decisions of the Court of Appeal favouring the "family assets" doctrine had not been overruled. Thus the basis upon which a contributing spouse acquired an interest was trust rather than contract doctrine; the intent to create the trust being inferred or imputed from the spouse's conduct and the circumstances.[85] Lord Denning's views appear to have dominated the post-*Gissing* cases.[86]

Lord Denning re-affirmed his faith in the doctrine of family assets in *Wachtel* v. *Wachtel*[87] where, in support of the doctrine, he invoked the aid of the Matrimonial Proceedings and Property Act[88] by claiming that sections 4 and 5 thereof, by directing the courts to take account of a spouse's contribution to the family welfare when dealing with property transfers and settlements, had approved the Court of Appeal's stance on this issue in past years: therefore a spouse who contributed to the acquisition of the matrimonial home directly or indirectly, in money or money's worth, acquired a proportionate interest therein.[89] Lord Denning concluded that section 5 thus enabled the court to take account of the non-financial contributions, for example the running of the home or rearing of the family, in order to award a joint share in the matrimonial home.[90]

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[84] (1970) 3 All E.R. 449.

[85] *Id.* at 52.

[86] See *Hargraves* v. *Newton* (1971) 3 All E.R. 866; *Re Cummins* (1971) 3 All E.R. 782; *Simon* v. *Simon* (1971) 115 Sol. J. 673; *Hazell* v. *Hazell* (1972) 1 All E.R. 923. But see *Davis* v. *Vale* (1971) 2 All E.R. 1021 where some judgments showed an approach differing from that of Lord Denning, holding that the vital issue was what agreement was in fact made rather than what agreement the court might impute to the spouses.

[87] (1973) 1 All E.R. 829.

The importance of the above statutory provisions, as now contained in the Matrimonial Causes Act of 1973, is to be seen in more recent cases. Thus in T. v. T[91] on an application under this Act to establish the spouse's interests in the matrimonial home, although the property was held in joint names the wife's interest therein was extinguished, the circumstances having shown that she had neither contributed to the purchase nor upkeep of the home although her salary was double that of her husband. Again in Brisdion v. Brisdion[92] where the matrimonial home was held in joint names and both contributed to the purchase the Court of Appeal held that the property be transferred into the wife's name alone because the circumstances were such that the wife was no longer able to work to help support the children.

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[88] See Statutory Reform, supra n.75.

[89] This case also held that there should be no post-mortem on the cause of marriage breakdown but this is difficult to reconcile with sec.25 of the Matrimonial Causes Act 1973, that the parties should be placed in the same position as if the marriage had not broken down.

[90] Lesser protests that this is a misrepresentation of the 1970 Act, supra n.37 at 201. Kahn-Freund hopefully anticipated this use of the 1970 Act some years earlier, supra n.37 33 M.L.R. at 627. See also Cretney, Matrimonial Property after Wachtel (1974) 118 Sol. J. 431.

[91] (1974) Fam., reported in (1975) 5 Fam. Law 80.

In a very recent case, Jones v. Jones,[93] the disadvantage accruing to the wife through the disparity of earning power between the spouses was emphasized. It was noted that through no fault of her own the woman, after devoting her earlier life to homemaking and rearing children, upon marriage breakdown found herself starting a career from scratch in middle life by which time the husband was well established and financially secure.

As to quantification of a spouse's beneficial interest, the court will make its determination in accordance with the circumstances of the case.[94]

b) In Canada

i) The Equitable Presumptions

As has been seen when discussing Pettitt v. Pettitt the presumptions of advancement and resulting trust have decreased in importance in England but this cannot be said for Canada to the same extent. However, it seems inevitable that Canada will follow suit for the presumptions are based on the principle of the husband's obligation to support his wife and inroads are being made on this principle. For example, on divorce the wife may be ordered to pay maintenance to the husband,[95] and in Alberta reciprocal duties of support are imposed by the Maintenance Orders Act.[96] Meanwhile, however, Canadian cases show the presumption to be still of considerable importance.[97]

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[92] (1974) Fam., reported in (1975) 5 Fam. Law 92.

[93] (1975) 2 All E.R. 12.

[94] See Leake (formerly Bruzzi) v. Bruzzi (1974) 2 All E.R. 1196 (C.A.); In Re Nicholson, Nicholson v. Perks (1974) 1 W.L.R. 476 (Ch.).

ii) *The Canadian Decisions*

The Canadian decisions as to the division of matrimonial property appear to have been weighted in favour of the husband,[98] so that unless a spouse can prove direct, substantial contribution to the purchase of the owner-spouse's property, or unless evidence of a trust can be shown, no beneficial interest in the matrimonial property will be acquired by the contributing spouse.

In *Thompson* v. *Thompson*,[99] Judson J. described as an "obvious principle" that where property is taken in the husband's name, the wife will not have a beneficial interest unless she can produce written evidence of an express trust.[100] While this case did not deny the power of the court to make an allocation where the wife made a direct financial contribution to the purchase of the matrimonial home, it insisted that husband and wife should be treated as strangers for this purpose; furthermore, a small contribution by the wife would not entitle her to a half share.[101]

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[95] Divorce Act (1970) R.S.C. C. D-8 ss.10, 11.

[96] R.S.A. (1970) c.222 s.4.

[97] *Wagner* v. *Wagner* (1970) 73 W.W.R. 474 (Alta); *Greggain* v. *Greggain* (1970) 73 W.W.R. 677 (B.C.): *Szymczak* v. *Szymczak* (1970) 3 O.R. 202.

[98] See generally *Cullity*, *supra* n.5; *Auld*, *supra* n.20; *Hahlo*, *supra* n.37; *Kahn-Freund*, *supra* n.16; *Ontario Law Reform Commission*, *supra* n.37; *Alberta Institute of Law Research and Reform*, *supra* n.37; *Jacobsen*, *infra* n.97.

[99] (1961) 26 D.L.R. (2d) 1 (S.C.C.).

Thompson also emphasized that marriage and cohabitation did not carry with them a proprietary interest in the matrimonial home, a principle enunciated later in Weisgerber v. Weisgerber[102] where it was made clear that in the absence of financial contributions to the purchase of the property, the fact of marriage and that the wife over the years had by her labour contributed to the maintenance and improvement of the home, would not avail to give her any proprietary interest therein. It was also pointed out that if the husband on purchase had placed the property in joint names, clear and cogent evidence would be required to rebut the presumption of advancement.

Where there has been direct joint contributions to the purchase price Canadian courts have been willing to infer a "joint venture", that the parties have pooled their resources, and that there would be unjustified enrichment of the owner-spouse unless the contributing spouse was given a beneficial interest.[103] But the Canadian courts will not help the wife who, in the absence of agreement, makes an indirect contribution.[104] Thus they would not help the wife who buys the food but they would help the wife who makes mortgage payments while the husband buys the food.

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[100] For comment on Thompson, see Wooton, Judicial Discretion in the Division of Matrimonial Assets. (1959-63) 1 U.B.C. Law Rev. 452 at 460; (1961) 39 Can.Bar.Rev. 432 at 440, 445.

[101] This was contrary to Gruert v. Gruert (1960) 32 W.W.R. 509 (Sask. Q.B.) where, following Rimmer, "palm-tree" justice was applied.

[102] (1969) 71 W.W.R. 461 (Sask.).

A farm wife's case was that of Klutz v. Klutz[105] where the property was in the husband's name and the wife made no financial contribution nor had she any agreement as to interests in the property. But because of the wife's work on the farm she claimed a partnership and right to a beneficial interest, which claim was refused on the ground that there had been no financial contribution and no agreement.

The trend appeared to be reversed when the Alberta Court of Appeal in Trueman v. Trueman[106] held that where a wife had made direct contributions in the form of labour over and above her wifely duties, she was entitled to a beneficial interest in the matrimonial home even although

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103. Atamanchuk v. Atamanchuk (1955) 15 W.W.R. 301 affd. 21 W.W.R. 335 (C.A.); More v. More (1974) 17 R.F.L. 5 (B.C.).

104. Rooney v. Rooney (1969) 68 W.W.R. 641 (Sask. Q.B.): Lawson v. Lawson (1966) 56 W.W.R. 576 (Man. C.A.); Re Whiteley and Whiteley (1974) 4 OR (2d) 393 (Ont. C.A.).

105. (1968) 2 D.L.R. (3d) (Sask.).

106. (1971) 18 D.L.R. (3d) 109. For an attempt to reconcile Trueman with Thompson see Wooton, Some Recent Developments in the Law of Matrimonial Property (1972) 10 Alta. L.R. 134 at 140.

she had made no direct financial contribution to the purchase. The application of the constructive trust principle was thus approved. But this victory was short-lived for in the now famous (or infamous) case of Murdoch v. Murdoch,[107] where the farm wife had made a substantial contribution to the husband's assets through her skill and industry out on the farm, the wife attempted to set up the constructive trust doctrine but she was denied any compensating interest in the matrimonial home because her contribution had been of an indirect, non-financial nature. Trueman was distinguished on the ground that it pertained to the homestead whereas in Murdoch the claim related to the whole ranching operation.

In Murdoch Maitland J. took the view that that, as said in Gissing, a resulting trust would arise in favour of a contributing spouse where either there existed an express trust of where the owner-spouse had caused the contributing spouse to believe that the contribution would give rise to a beneficial interest - thereby inducing the contributing spouse to act to her detriment. In other words, the purpose of the resulting trust was to give effect to the intentions of the parties as discerned either from an express agreement or from the circumstances. Thus Maitland J. was not in agreement with the post-Gissing cases in England, but the dissenting judgment of Laskin J. (as he then was) showed support for the more humanitarian view. He held that the appropriate mechanism for granting relief in such circumstances was the constructive trust and he is reported as summing up the post-Gissing cases as follows:[108]

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[107] (1974) 41 D.L.R. (3d) 367. See Jacobsen, Murdoch v. Murdoch: Just About What the Ordinary Rancher's Wife Does (1974) 20 McGill L.J. 308.

[108] (1974) 41 D.L.R. (3d) 367 at 389.

> "What has emerged in the recent cases as the law is that if contributions are established, they supply the basis for a beneficial interest without the necessity of proving in addition an agreement (see Hazell v. Hazell (1972) 1 All E.R. 923), and that the contributions may be indirect or take the form of physical labour (see Re Cummins (1971) 3 All E.R. 782)"

He then quoted Scott on Trusts:[109]

> "... a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.... The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property...."

In a similar case[110] the Saskatchewan courts recently refused to recognize the wife's considerable but non-financial contribution to the family assets. The Alberta Appellate Division has conceded however that a fairly indirect financial contribution will suffice to create an interest. Following Thompson v. Thompson, which had said that any financial contribution to the purchase price would create an interest, it was held in Devitt v. Devitt[111] that the wife's indirect financial contribution to the purchase of the matrimonial home entitled her to a beneficial interest therein. In this case the court was willing to trace the wife's contribution back to an early joint bank account into which she had deposited her earnings and from which the first matrimonial home had been purchased, the proceeds of sale of which had provided part of the purchase price of the property in question. The wife was awarded an equal share but it is not clear why an interest proportionate to her contributions was not awarded instead.

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[109] Scott, V Trusts 3215 (3d. 1967).

[110] Rathwell v. Rathwell (1974) 16 R.F.L. 387 (Sask.).

[111] Devitt v. Devitt (1974) 12 R.F.L. 48 (Alta).

There is thus no indication as yet that the Canadian courts are willing to adopt the approach of the constructive trust for resolving matrimonial property cases where there is a non-financial contribution to the purchase.[112] It may be however that the growing clamour for reform will have some effect before specific proposals for reform are approved and implemented.

iii) Canadian Mechanism for Dealing with Matrimonial Property Disputes

It is to be noted that all provinces, with the exception of Alberta, have an equivalent to section 17 of the Married Women's Property Act of 1882.[113] But no province has enacted legislation similar to section 39 of the Matrimonial Proceedings and Property Act of 1970 which gave a

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112. In the recent case of Fiedler v. Fiedler (1975) 3 W.W.R. 681 the decision in Murdoch was followed.

113. R.S.O. (1970) c.262 s.12; R.S.M. (1970) c.M-70 s.8; R.S.S. (1965) c.340 s.22; R.S.B.C. (1960) c.233 s.29; R.S.N.B. (1952) c.140 s.7; R.S.P.E.I. (1951) c.92 s.13; R.S.N.S. (1967) c.176 s.36; R.S.Nfld. (1963) c.227 s.16.

As has been seen when discussing Pettitt v. Pettitt this section does not enable the court to alter ownership rights but merely to determine where ownership lies.

spouse a beneficial interest in return for improvements made to the matrimonial property. Furthermore, since property legislation is a provincial matter, the federal divorce legislation could not cover property matters as does the English Matrimonial Proceedings Act of 1973. For these reasons the judicial use of the discretionary power under the Canadian equivalents of section 17 of the Married Women's Property Act of 1882 has developed differently from the English counterpart.[114]

Unlike the English courts, on granting a divorce under sections 10 and 11 of the Divorce Act[115] the Canadian courts have generally no power to order a sale or transfer of property; they can only make orders for payment of maintenance.[116] But by ordering maintenance in the form of a lump sum payment, they may occasionally achieve a redistribution of property.[117] However, some provinces make express provision for redistribution. In Alberta, for example, the Domestic Relations Act makes provision, after judicial separation or divorce on the ground of adultery, for settlement of the adulteror's property on the innocent spouse and children.[118] Meanwhile British Columbia has made a general provision for division of property on orders for divorce or annulment.[119] However, as Kahn-Freund comments,[120] "the problem of sharing between the spouses and of the protection of the non-earning housewife (which is part of it), can no longer be solved through the law of maintenance. It must comprise her share in what has been called "household property" or "family assets".

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[114] See Minaker v. Minaker (1949) 1 D.L.R. 801; Carnochan v. Carnochan (1955) 4 D.L.R. 81; Lawson v. Lawson (1966) 56 W.W.R. 576; Kearney v. Kearney (1970) 10 D.L.R. (3d) 138 (C.A.); Re Szymczak and Szymczak (1970) 12 D.L.R. (3d) 382.

[115] R.S.C. (1970) c. D-8.

[116] Switzer v. Switzer (1970) 7 D.L.R. (3d) 638 (Alta S.C.).

[117] Boultbee v. Boultbee (1972) 4 R.F.L. 237 (B.C.).

[118] R.S.A. (1970) c.113 s.22, as amended (1973) c.61.
The English Matrimonial Causes Act has dispensed with the limitation regarding adultery and it may well be argued that the abandonment of the principle of the matrimonial offence makes the adultery limitation outmoded as a basis for settlement of matrimonial property.

4. PROPOSALS FOR REFORM

a) The Alternatives

As has been seen, the separate property regime of the common law jurisdictions is far from satisfactory when applied to property which is jointly used or when applied to a situation where there is a mingling of assets. Moreover, the lack of certainty in the application of our artificial and technical property laws, and also the growing recognition of the value of the wife's role as homemaker, have made it imperative that we cast about for alternatives on a completely new basis.

There are a variety of possible alternatives:

i) Registration of Co-ownership

This system operates in New Zealand[121] and provides for registration of the home as a "joint family home" whereupon both spouses, regardless of their financial contributions, become legal and beneficial joint tenants.

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[119] Family Relations Act, S.B.C. (1972) c.20 s.8.

[120] Supra n.16 at 606.

[121] New Zealand Joint Family Homes Act (1964).

Registration is voluntary but New Zealand offers an incentive in the form of partial exemption from estate duty. However, since such a scheme is voluntary an owner-spouse could refuse to register in which case the position of the non-owning spouse would not have improved.

This system does not seem to do anything more than can be done at present by conveying the home into joint names.

ii) Judicial Discretion

The essence of a discretionary system is that the courts are empowered to divide the matrimonial property between the spouses. Again New Zealand has adopted this method by providing a procedure for settling property disputes during the marriage.[122] It is similar to section 17 of the Married Women's Property Act of 1882 but goes further by providing that the court may make such an order as appears just notwithstanding that the legal and equitable rights of the spouses are clearly defined or that one spouse has no such rights in the property.[123] This Act also makes explicit that the court will have regard to contributions in the form of services and prudent management as well as financial contributions;[124] but always providing the common intention of the spouses is preserved.

While the discretionary method seems an admirable way of redistributing family assets on marriage breakdown, it does not resolve the problem of establishing specific proprietary rights at the outset of the marriage.

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[122] New Zealand Matrimonial Property Act 1963 s.5(1) as amended.

[123] Id. s.(3).

[124] Id. s.6(1).

iii) Presumption of Co-ownership

This, again, is an extension of section 17 of the Married Women's Property Act of 1882 and is currently used in Victoria.[125] This scheme provides for a presumption that the matrimonial home is held by the spouses as joint tenants but always providing that such presumption will not defeat any common intention to the contrary and that the judge will use his discretion in special circumstances. Since the presumption only operates as between husband and wife this device may not go far enough, for example, a spouse would not be helped vis à vis a third party. Again difficult questions are posed as to when a contrary intention has been shown and as to what "special circumstances" may be. The only difference between this scheme and the previous one is that here the starting off point in any dispute is the presumption of co-ownership.

iv) Co-ownership by Operation of Law

This is a form of community of property but restricted to the matrimonial home. Under such a scheme the beneficial interest of each spouse would be determined by fixed rules rather than through judicial discretion or a rebuttable presumption: each spouse would derive an equal interest automatically regardless of financial contributions or other circumstances.

The major argument in favour of such a scheme is that it would avoid the uncertainty of judicial discretion and each spouse would be assured of rights in the matrimonial home from the outset of the marriage, both as between themselves and also in relation to third parties.

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125. Marriage (Property) Act (1962) (Vic.).

The argument against co-ownership by law is that no account is taken of special circumstances, for example, where a spouse whose private wealth need not be shared acquires a half interest in the other's only asset by virtue of a marriage perhaps of short duration. Furthermore, if a husband insisted on rented accommodation and invested his money elsewhere, the wife would not benefit. This, of course would be an argument for a broader sharing, for community of all assets.

v) Community of Property (or Sharing of Assets)

There are three broad types of community of property: full community which embraces all movables and those immovables acquired during marriage; community of gains where only property acquired during marriage is to be shared but excluding gifts or inheritance during the marriage; and deferred community under which a spouse may acquire and dispose of his or her own property during marriage but on termination of the marriage certain assets are shared. Common to all systems of community is that at some point certain assets are divided equally between the spouses, also, that the parties may opt out of the scheme (usually at the beginning of the marriage) if they agree either to retain separate property or to adopt some other scheme.

vi) The Choice of Quebec

The system chosen by Quebec is called "The Legal Regime of Partnership Acquests"[126] and came into force on July 1, 1970. This is a system of deferred community of property which allows the spouses to have independent ownership and control of their property during the marriage. But at the end of the marriage all property acquired during marriage (acquests) is subject to partition in equal shares, with the exception of property received by way of gift or by inheritance.

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[126] Statutes of Quebec (1969) c.77.

The Quebec regime specifies in great detail which property shall remain private and which are acquests belonging to the partnership. For example, income from private property is part of the acquests[127] but replacement of private property is not;[128] compensation for personal injuries is private property[129] as is capital distribution from shares.[130] But all property is deemed to be acquests unless the contrary can be shown.[131]

The partnership of acquests is dissolved on death, divorce, judicial separation or when the parties agree to modify the regime.[132]

Quebec believes that its new regime combines the advantages of separate property with those of community property and minimizes the disadvantages of both. But in view of the comparatively short time in which the Quebec regime has been in force, it is not yet possible to evaluate its success.

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127. Id. s.12266d.
128. Id. s.1266e.
129. Id. s.1266j.
130. Id. s.1266k.
131. Id. s.1266m.
132. Id s.1266r.

b) The English Law Reform Commission

The English Law Reform Commission produced a Working Paper in 1971 on Family Property Law[133] in order to promote systematic reform in this field. The public was asked to respond to this Working Paper and, in addition to wide consultation on the part of the Law Commission, a national survey was set afoot[134] in order to ascertain how spouses in fact managed their financial affairs, how much they understood the law governing such matters and, finally, what their views and wishes were on the ownership and division of matrimonial property.

As a result of submissions from the public and their own research, The Law Reform Commission was persuaded that in the interests of justice and certainty the introduction of fixed property rights was highly desirable and, in particular, that the public was overwhelmingly in favour of co-ownership of the matrimonial home.

The Commission based its case for reform on the complexity and technicality of present property law which could have only an artificial application to the matrimonial home, being unable to take into account the realities of the family situation. Furthermore, it said, the concept of separate property is no longer appropriate in a society where married persons often have joint use of their property and there is a mingling of assets. But the Commissioners saw as the most important factor indicating the need for reform, the basing of proprietary rights on financial contributions: this worked a severe hardship on the wife who, because of her role as mother and housewife, was unable to make financial contributions but, nevertheless, made a very real contribution to the marriage in her own sphere.

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[133] Working Paper No. 42 (1971).

[134] Todd and Jones, Matrimonial Property (1972) H.M.S.O. SBN 11 7001295.

The Commission points out, as another reason for drastic reform, the different treatment accorded the proprietary rights of the married woman according to whether the marriage is still subsisting, is brought to an end by death, or is dissolved by the courts. This point is brought home by the Commission by contrasting the cases of Cowcher v. Cowcher and Wachtel v. Wachtel. In Cowcher v. Cowcher[135] the wife sought a beneficial interest in the matrimonial home, the legal title to which was vested in the husband. The court, following Gissing v. Gissing[136] held that the trust principles must be strictly applied so that financial contribution was the only relevant factor; that the property might be considered a family asset, or what would be fair as between the parties, were held to be irrelevant considerations.

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135. (1972) 1 W.L.R. 425. In this case the wife had made a financial contribution towards the purchase of the matrimonial home although the conveyance had been taken in the husband's name. When a dispute arose during the marriage as to the respective interests of the husband and the wife in the home the principle of resulting trust was applied so that the wife was held to be entitled only to that share which would represent her financial contribution to the purchase. Although the wife had at times also paid the mortgage installments, since the intent was that these should be paid by the husband, a resulting trust was not deemed to have arisen in respect of them and they were discounted.

136. (1971) A.C. 886.

But in divorce proceedings a quite different approach is taken. In the celebrated case of Wachtel v. Wachtel[137] Lord Denning, stressing the importance of section 5(1)(f) of the Matrimonial Proceedings and Property

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[137] (1973) 2 W.L.R. 366. In this case the wife had made no financial contribution to the purchase of the matrimonial home but in subsequent divorce proceedings she was awarded a beneficial interest therein because of her work in looking after home and family and helping her husband in his business. Lord Denning M.R., declaring that heretofore the courts had been unable to do justice to the wife, quoted as follows from the Royal Commission on Marriage and Divorce [(1956) Cmd. 9678, 178]:

> "If, on marriage, she (the wife) gives up her paid work in order to devote herself to caring for her husband and children, it is an unwarrantable hardship when in consequence she finds herself in the end with nothing she can call her own."

In further pursuit of his argument Lord Denning, quoting Sir Jocelyn Simon [(1965) 62 The Law Society's Gazette, 345] said:

> "In the generality of marriages the wife bears and rears children and minds the home. She thereby frees her husband for his economic activities. Since it is her performance of her function which enables the husband to perform his, she is in justice entitled to share in its fruits."

Act,[138] declared that the court must take into consideration the fact that the wife who cared for the home and family contributed as much to the family assets as the wife who went out to work and made direct financial contribution.

After giving due consideration to all the alternatives the Law Commission concluded that:[139]

> (a) The present rules determining the interests of a husband and wife in the matrimonial home are in need of reform by the introduction of a principle of co-ownership under which, in the absence of agreement to the contrary, a matrimonial home would be shared equally between husband and wife.
>
> (b) So far as is practicable in the differing circumstances, the claim of a surviving spouse upon the family assets should be at least equal to that of a divorced spouse, and the court's powers to order family provision for a surviving spouse should be as wide as its powers to order financial provision on a divorce.[140]

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138. This section (now replaced by s.25 of the Matrimonial Causes Act 1973 c.18) gave guidance to the court when determining to which matters it should have regard when making orders for financial provision in cases of divorce, nullity or judicial separation. The section instructed the court to have regard, *inter alia*, to:

> "the contributions made by each of the parties to the welfare of the family, including any contributions made by looking after the home or caring for the family."

139. Law Reform Commission Report (1973) No. 52. For criticism of the Law Commission's conclusions see Kahn-Freund, (1972) 35 M.L.R. 403; Baxter, (1974) 37 M.L.R. 175; *Lesser*, *supra* n.37 at 209.

140. The position of the surviving spouse is discussed in Chapter Nine.

The Law Commission claims that its proposal would reflect the realities of family life; by applying during the subsistance of the marriage it would give security to the spouse who otherwise would have none; it would recognize the contribution of the homemaker and emphasize the partnership aspect of marriage and would eliminate the uncertainties of litigation.

In reply to criticism that the necessary improvements could be effected through exercise of the court's discretion, the Commission argues that such powers would merely adjust rather than determine existing proprietary interests, which at present can only be done in divorce, nullity or judicial separation proceedings. And even if such discretionary power could be exercised there would be no relief from uncertainty unless and until the matter was thrashed out in court.

In response to the charge that co-ownership of the matrimonial home could be arbitrary and unfair, adding a mercenary incentive to marriage, the Commission replies that its scheme would not be mandatory, that parties to a marriage could make whatever alternative arrangements they wished; and even if some unfairness did result would there be a greater balance of unfairness than presently exists?

With regard to the system of "deferred community" discussed in the Working Paper, the Law Commission's Report says that the results of the Social Survey disclosed that, on balance, the majority did not support a deferred community system. It anticipates, in the event that co-ownership of the matrimonial home is accepted, that many will feel that the further step of introducing a system of community may be necessary to achieve a fair balance. However, the Law Reform Commission is of the view that if co-ownership of the matrimonial home is implemented, and with the broad interpretation now being given in England by the courts of their powers to order financial provisions on divorce, and if such broad powers were also available in family provision proceedings, there would at present be no need to introduce a system of deferred community.

c) The Royal Commission on the Status of Women in Canada

In examination of the present law affecting matrimonial property and the steps being taken to bring about change, the Royal Commission was of the view that regimes which only brought about equal rights upon divorce or death do not go far enough. The Royal Commission hoped that some system would be devised to solve the problem of financial security during marriage for the non-earning spouse. The Commission therefore declared:[141]

> We recommend that those provinces and territories, which have not already done so, amend their law in order to recognize the concept of equal partnership in marriage so that the contribution of each spouse to the marriage partnership may be acknowledged and that, upon the dissolution of the marriage, each will have a right to an equal share in the assets accumulated during marriage otherwise than by gift or inheritance received by either spouse from outside sources.

It is desirable to show what has been the reaction to this call for reform in some of the provinces of Canada.

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141. The Royal Commission on the Status of Women in Canada (1970).

d) The Ontario Law Reform Commission

The Ontario Law Reform Commission has done extensive work in its Family Law Project. Like the English Law Reform Commission, the Ontario Commission first produced a Working Paper upon which comment was invited and, upon the basis of submissions received, it then drew up its Report.[142] The Ontario Commission's Report however contains the required detail for implementing its proposals.

Rather than embark on a program of piece-meal remedial legislation, the Ontario Law Reform Commission was convinced of the need to re-assess the underlying principles of existing law and devise new principles in keeping with the modern situation. It has therefore recommended a system of deferred sharing such that while the marriage subsists the spouses continue to be separate as to property, but upon termination of the marriage by death or divorce the combined assets acquired during marriage are to be divided equally between them. It is recommended that the proposed matrimonial property regime for Ontario should apply to all persons married after the regime became law - unless they formally elect otherwise. With regard to persons already married, the matrimonial property regime would not be imposed upon them but they would be free to adopt the new system.

In addition, the Ontario Commission advocates the principle of co-ownership of the matrimonial home so that it could only be disposed of during marriage with the consent of both spouses or by order of the court. This co-ownership principle would obtain whether the home had been brought

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142. Ontario Law Reform Commission: Report on Family Property Law (1974).

into the marriage by one spouse or acquired by either or both during the marriage and notwithstanding the fact that one party may have made no financial contribution thereto.

With regard to the rights of third parties in the matrimonial home, the Ontario Commission recommends that the beneficial interest of the spouse without legal title should prevail over the claims of purchasers, mortgagees or creditors who deal with the titled spouse. It would be encumbent upon such third parties to enquire whether the property was a matrimonial home and, if so, to seek the consent of the non-titled spouse to the proposed transaction. Furthermore, the occupational rights of the spouses in the matrimonial home would prevail over any rights to partition and sale.

This Commission proposed that in the event of dispute between the spouses as to administration, disposition or possession of the matrimonial home the court should be empowered "to make such order as it may deem just in accordance with the tenor and spirit of matrimonial law rather than strict property law principles."[143]

Reverting to the scheme for deferred sharing, the calculation for dividing the combined assets is to be made by establishing the net estate of each spouse, that is, the value of the property of each less debts. From this net figure for each spouse is subtracted the value of property owned at the date of marriage and any gifts received during marriage: the resultant figure is the residuary estate of each spouse. The two residuary estates are then added together and the total divided equally between the spouses. Subtracting the value of the smaller residuary estate from such a half share gives the equalizing balance which is payable in money to the spouse who had the smaller residuary estate.

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[143] Id. s.118.

The Report of the Ontario Law Commission also makes provision for those who wish to change from its matrimonial property regime to a separate property regime or to certain other regimes, or from the latter to the former.

e) The Alberta Institute of Law Research and Reform

i) The Considerations

The Alberta Institute first produced a Working Paper on Matrimonial Property in 1974 in which it examined all alternatives to a separate property system which seemed viable. It also conducted a survey[144] with a view to ascertaining the attitude of Albertans towards ownership and division of matrimonial property. Following on this survey and the submissions received in response to the Working Paper, the Alberta Institute has now produced its Report.[145] The Report is in the form of a Majority Proposal and a Minority Proposal, there being four members of the Institute in favour of the former and three in favour of the latter.

The Report of the Institute examines the main alternative proposals for reform of matrimonial property law and it may be useful to briefly outline the views of the Institute thereon before discussing the alternatives which have finally been chosen for recommendation.

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[144] L.W. Downey Research Associates Ltd., Matrimonial Property in Alberta: Facts and Attitudes (1974).

[145] Alberta Institute of Law Research and Reform: Matrimonial Property Report No. 18 (1975).

(a) Judicial Discretion.[146] The Institute sees three approaches to this system. Firstly, the court could be given a general authority to divide the property in a fair and equitable manner.[147] The Alberta Institute argues against this approach on the ground that some specific direction must be given to the courts to ensure some uniformity of fair treatment.

Secondly, the court could have as a goal the placing of the parties on as sound a financial footing as possible having regard to the future: this it would do by considering such things as future earning power of the spouses, loss of dower and inheritance rights, insurance and pension benefits. With such a goal the resultant division might well be on an unequal basis. This approach also is rejected because, in the opinion of the Institute, financial security should be only one of the factors to be considered.

The third approach to judicial discretion is that currently employed in England under the Matrimonial Causes Act[148] where the court is directed to have regard to many specific factors. This form of judicial discretion is approved by the Institute.

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[146] Id. at 16-19, 105-109, 118-130.

[147] This course has very recently been adopted by Saskatchewan, Married Women's Property Act R.S.S. (1965) as amended (1975).

[148] (1973) ss. 24 and 25.

(b) Community of Property.[149] While, as has been seen, there are various forms of community of property, the Institute is of the view that the only form which would be countenanced in Alberta is that which is restricted to property acquired after marriage. It is recognized that true community of property is effective in emphasizing the partnership aspect of marriage; that it gives assurance of equality and provides certainty. Nevertheless, the Institute does not view such a system with favour because the less worthy spouse would benefit unfairly; business insolvency or a suit for damages for negligence concerning one spouse could eliminate the assets of both, and the complexity of administration of community property it believes to be formidable.

(c) Deferred Sharing.[150] The form of community known as deferred sharing envisaged by the Alberta Institute is similar to that adopted by Quebec and proposed by Ontario whereby separate property obtains until termination of marriage whereupon the economic gains during marriage are shared equally. The Institute favours this form of deferred community because it permits the spouses to continue to deal with their own separate property while the marriage subsists and, when the marriage breaks down, where injustice would result from an equal division, adjustments can be made without breaching the basic principles of the system.

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[149] Supra n.145 at 19, 21-24.

[150] Supra n.145 at 20-51, 139.

(d) Co-ownership of the Matrimonial Home.[151] The Institute examined the principle of co-ownership of the matrimonial home as advocated by the English Law Commission. It rejected such a scheme either as an adjunct to the systems recommended by the Institute or as proposed in England. The reasons given are that automatic co-ownership could be unjust, it would involve intricate problems of conveyancing and taxation and, a very important factor, the public response to such a scheme was unfavourable.

ii) The Majority Proposal

The members of the Alberta Institue who support the majority view came to the conclusion that the same system could not be inaugurated both for those persons who would marry after the enactment of the proposed reforming statute and for those persons already married. Accordingly, the Majority Proposal recommends a different system for each of these two categories of married couples.[152]

For those who are already married and living in Alberta the Majority Proposal advocates a system of judicial discretion whereby upon separation or termination of marriage, or where matrimonial property appears to be at risk as a result of the actions of one spouse, an application may be made to the court to distribute fairly between the spouses the net economic gains made by the spouses during marriage.

In deciding how its powers should be exercised, the Court must have regard to all circumstances of the case including the contribution of each spouse to the welfare of the family; income, earning capacity, property and other financial resources both at the time of the marriage and in the future; financial needs, obligations and responsibilities; age, health and conduct of each party and in the case of divorce, the value of any benefits lost as a consequence.

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[151] Supra n.145 at 137-140.

[152] Supra n.145 at 3-5, 34-109, 155-180.

For those who marry in the future in Alberta, or who come to take up habitual residence in Alberta from another jurisdiction, the Majority Proposal advocates a regime of deferred sharing by which the spouses would share equally in the economic gains made during marriage other than by gift or inheritance. At the time of marriage it would be possible for Albertans to contract out of the deferred sharing scheme, if the court approves the contract, but otherwise it would apply. If the parties later sought to withdraw from the scheme application would again have to be made to the court for a sharing of their economic gains prior to terminating the regime in their case and making them separate as to property.

For those in this category, who marry after the proposed legislation is enacted, either spouse may apply upon separation, or dissolution of the marriage, or where there is a risk of dissipation of property, for the economic gains of the marriage to be divided and a judgement given for a balancing payment.

In order to determine what the balancing payment should be in a particular case the court shall decide what the share of each spouse is to be; what are the shareable gains of each spouse and what are the total shareable gains of them both. In order to compute the shareable gains, the value of a spouse's current property, less liabilities, is taken to comprise his or her net estate from which is taken away the value of property, less liabilities, owned at the time of marriage and also the value of property received by gift or inheritance during the marriage. The resultant figure gives the shareable gains of a spouse. Having determined in advance the respective shares of the parties, their total shareable gains would then be apportioned accordingly. Where the actual shareable gains of a spouse were less than the apportioned figure, the difference would be the balancing payment.

In determining the respective shares of the spouses, the principle of equal sharing is to be adopted but not rigidly applied so as to work an injustice. The proponents of the Majority Proposal agree that where discretion is involved to vary the equal shares it should not operate to provide an economic sanction for a "matrimonial fault" or for personal failings. However, they believe that when it can be said that a spouse has failed to do what might reasonably have been expected of him or her to such an extent that equal sharing would be unfair, then the court may apportion in other than equal shares. "Contributions" in this context is deemed to include money or money's worth and comfort, society, services and assistance.

It is proposed that the Trial Division of the Supreme Court of Alberta be the court with jurisdiction.

iii) The Minority Proposal

The Minority Proposal would apply the same scheme to those Albertans already married and living in Alberta and to those Albertans who after the reforming legislation become married and live in Alberta or who being married elsewhere came to live in Alberta.[153]

The essence of the Minority Proposal is that, on separation, termination of marriage or on risk of dissipation of property to the detriment of the other spouse, either spouse may apply to the court to divide all the matrimonial property between the parties, not merely the economic gains made during marriage, in accordance with principles of fairness and justice in the individual case.

The court would be given specific factors to be considered which would include, inter alia, the contributions of the parties, which would include homemaking and child rearing; the income, earning capacity and other financial resources of the parties; the needs, obligations and responsibilities of the parties; loss of benefits deriving from termination of the marriage; the age and health of the parties and the duration of the marriage. In a system of judicial discretion the Minority Proposal contends that it is quite proper for the court to have regard to the conduct of the parties. This would therefore include taking cognizance of "matrimonial fault" but, in keeping with modern thinking, it is advocated that only extreme misconduct should have a bearing on the distribution of matrimonial property.

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[153] Supra n.145 at 6, 180-188

An often major factor which must always be borne in mind by the court is how to avoid harm outweighing benefit in cases such as a family farm or business where the making of a balancing payment could well require the sale of the business or farm. The Minority Proposal acknowledges the very real difficulty inherent in such a situation and hopes that the court may always find some acceptable alternative form of disposition. It is proposed that broad powers be given to the court to enable it devise the most appropriate arrangements in each case either by a division of property or payment of money.

f) The British Columbia Royal Commission

The British Columbia Royal Commission has recently published a detailed Report on Matrimonial Property[154] in which it advocates a system of community property for British Columbia. This decision is based on the following premises:[155]

a) All persons should be equal under the law.
b) Marriage is a partnership of shared responsibilities.
c) The roles of economic provider and homemaker are of equal value to the relationship.
d) Husband and wife are economically competent.

The notion of separate property is described as "antithetical to the notion of marriage as an economic partnership of equals"[156] and it is claimed that any attempt to modify the existing system to provide more "equity" between spouses would be but "protective legislation" which would only reinforce the inequity. The Royal Commission claims that community property, the sharing of all property accumulated during marriage, was the only alternative which fitted the aforementioned four operative principles.

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[154] Royal Commission on Family Law: Report on Matrimonial Property 6 (1975).

[155] *Id.* at 2.

[156] *Id.* at 3.

The Report recommends that no provision be made for court adjudication of disputes over community property on the ground that a decision of community property is a decision within the marital relationship, and within that relationship husband and wife must settle matters between themselves. Where no agreement can be reached there must be a winding up. Community, the Report provides, can be terminated by agreement, a decision of the Supreme Court or by death.

g) The Manitoba Law Reform Commission

The Manitoba Law Reform Commission has just published a Working Paper on Family Law[157] in which it examines and makes recommendations on the division of matrimonial property.

After noting all the inequities inherent in the separate property system, where it points out that the bitter lesson of *Murdoch* v. *Murdoch* is that "the semantic equality of separation of property is no comfort at all to the separated spouse who owns no property",[158] the Manitoba Commissioners put forward for comment their own proposals.

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[157] *Working Paper on Family Law Part II* (1975).

[158] *Id.* at 33.

The Manitoba Commission advocates that the matrimonial home should become, by standard operation of the law, the jointly owned property of both spouses. Such a jointure would be inseverable so that a voluntary disposition could only be effected by mutual agreement.

With regard to other matrimonial assets acquired during marriage, it is suggested that, upon separation, dissolution of the marriage or on risk of squandering, either may apply to have them shared equally, with the exception of property acquired by gift or inheritance; such sharing should not necessarily be in kind and could be by way of money payments.

While the proposals of the Manitoba Commissioners are seen to be similar to the deferred sharing system proposed by the Ontario Law Reform Commission, the Manitoba Commissioners profess themselves to be appalled at the complexity of the detailed provisions of the Ontario Scheme. But each step they take to ensure a more just distribution, they claim, seems to draw them "inexorably into new complexity" so that they concluded that "injustice, it seems, is simple and cheap; justice, apparently is complex and dear."[159]

The advantages of including some system of judicial discretion are seen as largely illusory. The Commissioners contend that "Generations of insistent litigants, creative lawyers and innovative judges could render the law most uncertain of application in any particular case ...."[160]

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159. Id. at 53.

160. Id. at 56.

They therefore anticipate that after a short testing period fairly precise laws could be drawn up which would spare couples the trauma and expense of seeking relief through judicial discretion.

The Manitoba Commissioners, believing that spouses should be able to choose their property regime, recommend a standard regime applicable to all unless the parties enter into a marriage contract providing for a contrary arrangement.

h) The Saskatchewan Law Reform Commission

The Saskatchewan Law Reform Commission produced two Working Papers[161] in which it examined the problems of a separation of property system and possible solutions thereto. A third Working Paper was then published in which tentative proposals for reform were made.[162]

The Saskatchewan Commissioners saw marriage as a partnership of equals founded on both status and contributions. To achieve an equitable distribution of matrimonial property they concluded that what was required was a degree of certainty together with an element of flexibility.

The first and most immediate step of reform advocated by the Saskatchewan Law Commission is that legislation be passed giving the courts a wide discretion to order division of all property between spouses.

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[161] First Mini-Working Paper (June 1974); Second Mini-Working Paper (Sept. 1974).

[162] Tentative Proposals for Reform of Matrimonial Property Law: Third Working Paper (October 1974).

The second subsequent step would be that legislation be passed later to provide, retroactively, for co-ownership of the matrimonial home.

The third proposed step would be the adoption of a scheme of deferred participation which would only apply prospectively and only to those who had not made contrary arrangements.

In order to avoid rigidity and hard cases the Saskatchewan Commission also envisages that the plans for co-ownership and deferred participation would be supplemented by a small measure of judicial discretion which would only be exercised pursuant to clear and certain guidelines.

i) The Law Reform Commission of Canada

The Law Reform Commission of Canada has recently produced some guidelines concerning matrimonial property. This Commission notes that while matrimonial property law is a matter for the provincial legislatures, the Parliament of Canada has a certain interest in these matters since it has jurisdiction over marriage and divorce. While Parliament has legislated to make certain financial provisions on divorce it is clear that questions of maintenance cannot be resolved in isolation from issues relating to property rights. Furthermore, the federal Government has an interest in promoting uniformity and consistency among the provinces and to this end the Law Reform Commission of Canada has produced a Working Paper on matrimonial property.[163]

After examining the difficulties inherent in the separate property regimes of the common law provinces, the Commission proceeds to discuss alternatives: separation of property combined with judicial discretion; separation of property but with co-ownership of the matrimonial home; true community of property; a system of deferred sharing.

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[163] Family Property: Working Paper 8 (1975).

After examination of some of the policy issues involved, for example, the weight to be attached to marital misconduct and the effect of retroactivity in reforming legislation, the Canada Commission came to the following conclusions.

Firstly, that equality before the law should be the foremost goal of reform.

Secondly, that any of the regimes discussed, or any combination of them, would be a significant improvement over the present law of separation of property.

Thirdly, when whatever reforming legislation is enacted, there will inevitably be significant tax changes and it will be incumbent upon Parliament to ensure that following a change in the law there will be no greater tax imposition on married persons than at present exists. Moreover, Parliament should lend encouragement to matrimonial property law reform by amending taxation laws where required notwithstanding any view Parliament may have that the proposed arrangement is less than ideal.

Fourthly, property sharing (excluding property owned before marriage or acquired by gift or inheritance) should be available on divorce but not restricted thereto and should have full retroactive application.

Fifthly, moral or marital misconduct should not be a consideration in property sharing.

Finally, there should be eliminated from the law of separate property all laws which give rise to discrimination against a married person based on sex.

5. CONCLUSIONS

a) Current Trends

All areas considered appear to agree that the system of separation of property must be replaced in order to recognize the role of the wife as contributing to the matrimonial partnership in a manner of equal value to that of the husband. There is much concern that marriage at last be unequivocably recognized as a partnership and that the status of the wife should reflect this fact. It is generally conceded that heretofore, where the wife has not been a wage earner, her status has been one of economic servitude with no account being taken of her work in looking after home and family: work as a result of which she is denied the opportunity of remunerative work and training outside the home which would enable her to gain some financial independence. There is further concern that the law still regards the wife as the husband's dependant and the wife consequently finds herself in the iniquitous position of being utterly dependent on her husband's good will. This it is resolved to change.

The philosophy of community of property now seems to appeal to the western world but in varying degrees. Of the areas considered only British Columbia feels that full community of property is both desirable and necessary. The other areas believe that most people have a natural and reasonable desire to acquire property of their own and that this should not be interfered with because property can always be held jointly if the parties so desire. However, a distinction between the matrimonial home and other matrimonial assets is drawn by England, Ontario, Manitoba and Saskatchewan in order to protect the wife. These jurisdictions maintain that the wife's right to a beneficial interest in the home must be declared and so they advocate co-ownership of the matrimonial home.

Alberta, Saskatchewan and Quebec contend that, with regard to matrimonial property in general, any statutory interference as to ownership is not warranted while the marriage continues in peace. However they agree, together with Ontario and Manitoba, that on separation or termination of the marriage an automatic, equal division of the matrimonial property is required and so they advocate a system of deferred community of property.

The Minority Proposal of the Alberta Institute, and the Majority Proposal concerning those already married, favour the use of judicial discretion for effecting a just distribution of matrimonial property on separation or termination of marriage. Saskatchewan also see this method as useful but only as an immediate device. England views judicial discretion as a perfectly adequate mechanism in this regard when adopted in conjunction with the other steps it has advocated.

b) Suggestions

It it submitted that the views of the various reforming agencies which have been discussed indicate that the time has not yet come for full community of property in either England or Canada. Meanwhile it has been observed that England and Canada being at different stages of evolution in the matter of division of matrimonial property, what is right for one country at this moment is not necessarily right for the other - despite the fact that the ultimate goals concerning the status of women may be the same. Since England already has provision for equitable dsitribution of matrimonial property on marriage breakdown it is understandable that its society, in pursuit of its ultimate goal of equality, feels ready for the further step of co-ownership of the matrimonial home during the subsistence of the marriage. It is therefore hoped that the proposals of the English Law Reform Commission will be implemented in England.

It is suggested that in Canada co-ownership of the matrimonial home while the marriage is peaceful is as yet unnecessary and that the security which would be accorded the wife thereby would be offset by many disadvantages. These disadvantages would result from problems of conveyancing where property is presently held in the husband's name; problems as to how the property should be controlled and problems as to who would be responsible for administration. It would be useful for Canada, in the event that co-ownership of the matrimonial home is implemented in England, to observe whether these problems are in fact serious ones or whether they are perhaps illusory to some extent.

It is suggested that a system of deferred community on a basis of equality will go far to remedy existing injustice in Canada but that unless a mechanism of judicial discretion is coupled therewith, further inequities may abound. It will have been noted that the deferred sharing schemes of Ontario and the Majority Proposal of the Alberta Institute differ in that Ontario appears to recommend an arbitrary equal division upon which is based the balancing payment calculation whereas Alberta advocates first a determination of the proportion in which the shares should be allocated and then calculates the balancing payment accordingly. On the ground that the Alberta procedure indicates the more practical and equitable method, the Alberta stance would be preferred. However it is not clear the extent to which the tempering effect of judicial discretion would be employed in the Alberta proposal.

It is suggested that a system of deferred community overlayed with a clear judicial discretion mechanism be adopted by all Canadian Provinces and that co-ownership of the matrimonial home not be attempted at this time. The deferred community system would apply only to assets acquired during the marriage, with the exception of property acquired by gift or inheritance, and whereas there would be provision that the residuary estate of husband and wife be totalled and divided equally, there would lie an appeal to the court to vary this proportion when it would be unjust to hold that equality was equity.

It is further suggested, despite the autonomy of the individual provinces in property matters and because the property system chosen by each province will inevitably have repercussions upon other areas coming within the purview of the federal governemnt, such as divorce, and taxes, that serious consideration be given by each common law province to entering upon a basic single system of property reform in the interests of consistency, conformity and efficient administration.

CHAPTER SIX THE MARRIED WOMAN'S PARENTAL RIGHTS AND DUTIES

1. THE NATURE OF PARENTHOOD

Parenthood has been variously described. In the words of Hughes:[1]

> Parenthood is a combination of interrelated rights and duties that parents have with respect to their children. Parental rights in young children generally include the right to control, custody and natural guardianship, the determination of living standards, religion, education, earnings and of expenditure and the right to notice and appearance of judicial proceedings involving their children. Coupled with these rights are parental responsibilities for the care, support, guidance and supervision of their children. Although the nature of these rights and duties has not changed appreciably, this century has seen a noticeable shift from an almost exclusive emphasis on parental rights to an emphasis on the interdependency of parental rights and duties."

Parental duty was not a concept familiar to the common law and was of a moral rather than a legal nature[2] until the start of Poor Law legislation in 1657. Even then the plight of the child was often very real and to mitigate the hardship suffered by children Equity intervened to extend its protection. This it did by placing a curb on the almost unlimited rights of the parent. In Eyre v. Shaftsbury an historic principle was established when the Lord Chancellor declared that "... the care of all infants is lodged in the King as pater patriaes and by the King this care is delegated to his Court of Chancery."[3]

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[1] Hughes, Adoption in Canada in Mendes Da Costa (ed) 1 Studies in Family Law 104 (1972).

[2] For an historic account of rights and duties concerning children see Pettit, Parental Control and Guardianship in Graveson and Crane (ed) Century of English Law 56 (1957); Sidney and Beatrice Webb, English Local Government: English Poor Law History 52 (1927).

2. THE STATUS OF THE MOTHER

At common law parental rights vested in the father alone.[4] But with the first modern landmark in the matter of parental rights and duties, the Guardianship of Infants Act 1925, two most important principles were established. First, that the welfare of the child was paramount and would prevail over the rights of parents and secondly, that there should be equality in law as between the father and mother.[5] The latest statutory expression of the principle of equality in this matter is to be found in The Guardianship Act of 1973 which provides:[6]

> In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other.

Recognition of the mother as having joint and equal rights of guardianship with the father over their legitimate children has also taken place in Canada. In Alberta, for example, it has been enacted:[7]

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[3] (1725) 2 P.Wms. 102 as reported in Webb, supra at 207.

[4] De Manneville v. De Manneville (1804) 10 Ves. 52.

[5] Guardianship of Infants Act (1925) 15 and 16 Geo.5 c.45 s.1.

> "Unless otherwise ordered by the Court the father and mother of an infant are the joint guardians of their infant...."

But since, as one writer has said, "parental power probably cannot be defined except as a residue of all power not lodged elsewhere by the law",[8] the precise extent of a mother's parental rights cannot easily be defined. However, an attempt will now be made to examine the rights and duties of the mother[9] which, for the most part, will be the same as those of the father.

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[7] The Domestic Relations Act R.S.A. (1970) c.113 s.37. See also Infants Act R.S.O. (1970) c.222 s.2: Child Welfare Act R.S.M. (1970) c.C80 ss.102, 103; Guardianship of Children Act N.B.S. (1973) c.11 s.2(1); Infants Act R.S.S. (1965) c.342 s.2; Equal Guardianship of Infants Act R.S.B.C. (1960) c.130 ss.4,5.

[8] *Kleinfeld*, *infra* n.9.

[9] See generally Bromley, *Family Law* 263 (4th ed. 1971); Johnson, *Family Law* 261 (2d ed. 1965); Turner, *The Law of Married Women* 438 (1957); *Pettit*, *supra* n.2; Robinson, *Custody and Access in Mendes Da Costa (ed) 2 Studies in Canadian Family Law* 543 (1972); Bevan, *The Law Relating to Children* (1973); *United Nations Commission on Status of Women: Legal Status of Married Women* 19 (1958) ST/SOA/35; *Ontario Law Reform Commission Report on Family Law: Part III Children* (1973); James, *The Legal Guardianship of Infants* (1966) 82 L.Q.R. 323; Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State* (1970) 4 Fam.L.Q. 410; Hall, *The Waning of Parental Rights* (1972) 31 Camb. L.J. 248; Eekelaar, *What are Parental Rights* (1973) 89 L.Q.R. 210; Inker, *Expanding the Rights of Child in Custody and Adoption Cases* (1971) 5 Fam.L.Q. 417.

3. PARENTAL RIGHTS

a) Custody

i) The Nature of Custody

The most important of parental rights is that of custody. There is a narrow meaning to the term custody which is the right to physical care and control, or possession. There is also a wider and more common meaning which Bromley described as "the whole bundle of rights and powers vested in a parent or guardian."[10] Lord Denning has wryly observed "... (custody) is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."[11]

It is to be noted that the various rights contained in the concept of custody are separable. Thus, on break up of the marriage, the court may grant physical care and control to one parent and custody in the sense of the supervision of the child's upbringing to the other parent.[12] Such a split order will only be made in special circumstances such as where the father's influence is desirable but he is overseas; custody might then be given to the father and care and control to the mother. Another permutation of custody, care and control is where the care and control is given to one parent or a third party and no order made as to custody, thus leaving both parents with a say in the child's upbringing.[13]

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[10] Supra n.9 at 268.

[11] Hewar v. Bryant (1969) 2 All E.R. 578 at 582.

[12] Such an order is possible under the Matrimonial Proceedings and Property Act 1970 and the Guardianship of Minors Act 1971.

It is not possible for a parent to abrogate the parental right of custody by assigning it to another. Such an agreement would be void as contrary to public policy[14] - unless it was an agreement between parents and was for the benefit of the infant.[15]

ii) Disputes over Custody

Disputes over custody may be resolved in England either by application by either parent under the Guardianship of Minors Act 1971 or as part of matrimonial proceedings. The use of habeas corpus proceedings for the purpose is no longer necessary for a parent.[16]

Regarding a period of dispute before the courts can adjudicate in England, since father and mother have equal rights of guardianship, the parent with de facto custody will presumably retain custody until a court order is obtained, the other parent having no better right.[17] But in some provinces in Canada this is not so. In Saskatchewan, in the absence of agreement or court order, the mother has the right to custody of an infant child below 14 years of age and the father has the right for the remainder of the child's minority.[18] In British Columbia statute provides that the parent with de facto custody is entitled thereto until adjudication.[19] Meanwhile in New Brunswick and Nova Scotia, there being no legislation as to rights of custody, the father's common law right of custody presumably prevails in the absence of agreement or court order to the contrary.

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[13] Re M. (infants) (1967) 3 All E.R. 1071 (C.A.); Jussa v. Jussa (1972) 2 All E.R. 600.

[14] Walrond v. Walrond (1858) John. 18.

[15] Custody of Infants Act 1873 s.2; The Guardianship Act (1973) c.29 s.1(2).

[16] Bevan, supra n.9 at 404.

[17] Re Campbell (1933) 3 D.L.R. 448 at 451.

In other than matrimonial proceedings, applications for custody in England may be made to the Family Division of the High Court or to a county court or magistrate's court. In Canada the Supreme Court or Court of Queen's Bench has jurisdiction but the provinces have made provisions for custody applications to be heard by lower courts also. For example, in Alberta jurisdiction to hear and determine applications for custody is vested in the Family Courts.[20]

Most applications concerning custody are made in conjunction with matrimonial proceedings. Thus in England, in any proceedings for divorce, mullity or judicial separation the court may make such order for custody

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18. The Infants Act R.S.S. (1965) c.342 s.22(3).

19. The Infants Act R.S.B.C. (1960) c.130 s.11.

20. The Family Court Act R.S.A. (1970) c.133. See also Child Welfare Act R.S.O. (1970) c.64 s.20(2); Child Welfare Act R.S.M. (1970) c.80 s.102; Child Welfare Act (1970) R.S.N. c.37 s.54.

as it thinks fit. [21] Similar provisions are made in Canadian divorce legislation [22] and in provincial matrimonial legislation. [23] As in any type of custody application, since the needs of the child may well change from time to time, such orders may be altered as required.

iii) Factors to be Considered in Custody Disputes

When considering applications for custody, the courts both in England and Canada must have regard to the cardinal principle that the welfare of the child is paramount. [24] Moreover, in England a decree of divorce, nullity or judicial separation can not be made absolute unless and until the court is satisfied that the best possible arrangements have been made for any minor child of the family or any child of the

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21. Matrimonial Proceedings and Property Act (1970) c.45 as amended by the Matrimonial Causes Act (1973) c.18.

22. The Divorce Act R.S.C. (1970) c.D-8 ss.10, 11.

23. For example. The Domestic Relations Act R.S.A. (1970) c.113 ss.44, 45,46.

24. The Guardianship of Minors Act (1971) c.3.

> Sec. 1 provides:
> Where in any proceedings before any court ...
> a) the custody or upbringing of a minor; or
> b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration ....

family.[25] Under Canadian legislation the court may make an order for custody if it thinks it fit and just to do so and such an order will apply to "children of the marriage" which term means each child of a husband or wife who is under 16 years of age, or over that age if unable to support him or herself.[26]

Additional facts taken into consideration by the English courts in custody disputes are the personality and character of the claimants, the sex and age of the child, the accommodation and material advantages available to the child, the parents' conduct, medical evidence concerning the child, the desirability of keeping siblings together and the wishes of the child.[27] It is to be noted that adultery is no longer a bar to custody[28] and the old rule that a baby girl should be with her mother and an older boy with his father no longer holds if the welfare of the child indicates a contrary arrangement.[29]

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25. Matrimonial Proceedings and Property Act (1970) c.45 s.17. This Act, for the first time, recognizes the possible need of a child for parental protection after reaching the age of majority.

26. The Divorce Act R.S.C. (1970) c.D-8 s.2(b).

27. Bromley, supra n.9 at 276.

28. Willoughby v. Willoughby (1951) P 184 (C.A.). See also Philpott v. Philpott (1954) 3 D.L.R. 210 (Ont. C.A.) where held that even serious misconduct would not outweigh the welfare and happiness of the child.

29. Re C (A) (an infant), C v. C (1970) 1 All E.R. 309.

The prima facie right at common law for the father of a legitimate child to be granted custody of the child is displaced under the Canadian Divorce Act by the factor of the welfare of the child. The Canadian Divorce Act enjoins the court to have regard to "the conduct of the parties and the conditions, means and other circumstances of each of them"[30] Curiously enough, this Act makes no reference to the welfare of the child but it may be assumed that this is a primary factor as it is in custody applications not connected with divorce proceedings. As Lord Simond said "...the welfare and happiness of the infant is the paramount consideration in questions of custody...to this paramount consideration all others yield"[31] Laskin, J. A. (as he then was) delivered himself as follows on the matter of custody: [32]

> "In this connection, I cannot accept the suggestion of counsel for the husband that the common law rule of a father's prior claim to custody, all else being relatively equal, should prevail under the Divorce Act, in line with such cases as Re Scarth (1916) 35 D.L.R. 312, 26 D.L.R. 428 and Re Garwood (1923) 55 D.L.R. 43. I do not propose to resurrect a doctrine that has expired for want of social nourishment and that is alien to policies embedded in infants and child welfare legislation; and alien as well to a consistent and well-established line of judicial decision that puts primacy where it should be, that is, on the welfare of the children. The relative qualifications of competing spouses or others for the custody of children must be assessed from the standpoint of what will best serve the interests of the children rather than from the standpoint of a quasi-proprietary claim to the children regardless of or in subordination of their interests."

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[30] The Divorce Act R.S.C. (1970) C.D-8 s.11.

[31] McKee v. McKee (1951) 2 D.L.R. 657 at 666 (P.C.).

[32] Dyment v. Dyment (1969) 2 OR 748 at 750 (C.A.).

In arriving at a decision as to what is best for the welfare of the child Khetarpal says the Canadian courts should consider the following principles:[33]

a) a child of tender years should normally be with its mother;

b) a girl should normally be with her mother and a boy, unless of tender years, with his father;

c) the children of a marriage should normally be kept together;

d) the child's wishes should be considered if he is sufficiently mature; and

e) the parents' plans for the care, maintenance and upbringing of the child should be considered as well as the conduct and wishes of the parents.

The case law on the factors which are relevant for determining what is in the best interests of the child or for the welfare of the child shows that generally the courts consider that it is for the welfare of a young child to be in the custody of the mother and that families should stay together. The moral fitness of a parent is also considered a relevant factor in determining whether it is in the best interests of a child to grant custody to that parent. Moral fitness is determined partly by reference to the marital good conduct or misconduct of the parent and partly by reference to his general character, nature and repute. The extent to which a parent loves his children is gauged partly by whether the parent provides for the children or whether he has abandoned or neglected them. Adultery is treated by some judges as a factor which does not necessarily make the mother an unfit person to whom it would not be in the best interests of the child to grant custody.[34] According to a University of Manitoba Professor:[35]

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[33] Khetarpal, Family Law (1975) 7 Ottawa Law Rev.222.

> "Even though a mother may have failed in her conjugal duty towards her spouse, by committing adultery, this does not necessarily mean that she lacks affection for her children, so that it may be for the welfare of her children to allow them to remain with her."

The provincial statutes attempt to establish guidelines for custody cases, each in their own way;[36] the most common provisions being to consider the welfare of the child, the parents conduct and their wishes.

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34. Wilson v. Wilson (1957) 21 W.W.R. 28 (B.C.S.C.)
Re Cyr Infants (1969) 68 W.W.R. 273 (B.C.S.C.).

35. Master, Report of Research in Canadian Family Law, 100 (1970).

See also Khetarpal, supra n. 33 at 222 citing Richardson v. Richardson (1971) 17 D.L.R. (3d) 481 where custody of the child was awarded to the mother notwithstanding that she was living in adultery. In this case there was no evidence that her relationship with the co-respondent was having a harmful effect on the child and the evidence indicated that she was a good mother.

36. The Domestic Relations Act R.S.A. (1970) c.113 s.46; Equal Guardianship of Infants Act R.S.B.C. (1960) c.130 s.13; Infants Custody Act R.S.N.S. (1967) c.145 s.2; The Infants Act R.S.O. (1970) c.222 s.1(1); The Children's Act R.S.P.E.I. (1951) c.23 as amended by Stat. P.E.I. (1968) c.5 s.2; The Infants Act R.S.S. (1965) c.342 s.2(1).

In Nova Scotia however, where this kind of wording is employed, judicial interpretation has resulted in a regrettable resussitation of the common law preference for the father in custody disputes [37] and in Pennie v. Pennie[38] it was said that the court had discretion in such matters and should have regard to the principle that the father had the right to the custody of his children unless the paramount welfare of the children indicated to the contrary.

It may be noted that in Alberta, in addition to the aforementioned general guidelines, legislation invites the court to refuse custody to the parent whose misconduct leads to divorce or judicial separation [39] and if such a parent is declared unfit to have custody, that parent will not be entitled as of right to custody or guardianship on the death of the other parent. [40]

The result of the general application of the principle that the welfare of the child is paramount, has altered considerably the parental right of custody. Hall maintains that while the right of custody has not been completely abrogated, its effectiveness has been drastically curtailed.[41] But the way in which this principle should be exercised by the courts should not be to exclude all else. As Lord MacDermott has put it, this principle is

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[37] Re MacNeil (1964) 46 D.L.R. (2d) 185 (N.S.S.C.).

[38] (1966) 52 M.P.R. 68 per McLellan J. at 75.

[39] The Domestic Relations Act R.S.A. (1970) c.113 s.44 (1) as amended.

[40] Id. s.44(2).

> "...a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare."[42]

iv) The Right to Access

Where custody is granted to one parent, access is usually granted to the other on the ground that access is "no more than the basic right of any parent"[43] and will only be withheld in exceptional circumstances in the interests of the child.[44] But it is clear that the court in considering the question of access must have regard to the same type of factors as when considering custody - and again the welfare of the child is paramount.[45]

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41. Hall, supra n.9 at 254. But see Inker, supra n.9 where claimed that there is a tendency recently in United States to give priority to the natural rights of the mother on the basis that this is stronger than any other factor.

42. J. v. C. (1970) A.C. 668 at 710 (H.L.).

43. S v. S. and P (1962) 2 All E.R. 1 per Willmer L.J. at 3.

44. Csicsiri v. Csicsiri (1973) 13 R.F.L. 263 (Alta).

45. Matrimonial Proceedings and Property Act (1970) c.45 s.17(1)(b)(i); The Domestic Relations Act R.S.A. (1970) c.113 s.46. See also affirmation of this principle in Re Tuohimaki (1971) 15 D.L.R. (3d.) 287.

b) Services

At common law the father, and if dead the mother, had the right to the services of an infant child. The basis of this right was the master-servant relationship which existed between the master of the house and his child. It would therefore appear that, despite legislation to give husband and wife equal rights in the matter of guardianship or custody, a wife living with her husband may have no legal right to her child's services since the husband is still deemed "the responsible parent" and the master of the house.[46]

At common law an action per quod servitium amisit lay to enforce this right against anyone who wrongfully deprived the parent, either by deliberately or negligently injuring the child, or by seduction, abduction, enticement or harbouring.[47] It was necessary to show that the child did perform some service, therefore no action would lie where the child was too young or not living at home or in the employment of another person.[48] However, in Alberta an action may be brought by the father, and if dead by the mother, for seduction and it is not necessary to prove an act of service; "...the act of service shall in all cases be presumed...."[49]

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[46] See Peters v. Jones (1914) 2 K B 781 where it was reasoned that a child is in the same position as any ordinary servant in that he is deemed to be the servant of the husband rather than the wife. See also Beetham v. James (1937) 1 K B 527 where held the right to services resides in the father. Bromley suggests that the courts might now acknowledge an equal right in the wife (supra n.9 at 304).

[47] As has been seen, however, actions for loss of services through seduction, enticement or harbouring have now been abolished in England.

[48] Dean v. Peel (1804) 5 East 45.

[49] The Seduction Act R.S.A. (1955) c.303 ss.2,3.

Thus, although the legal enforcement would be impossible inter se, the parental right to services provides the parent with a remedy against a stranger who interferes therewith.

The parental right to a child's services may well be an anachronism.[50] Furthermore, the child's "duty" to perform services for a parent is surely a legal fiction in that the idea of it being enforceable is quite repugnant. It is therefore suggested that actions for loss of services be abolished and that there be substituted therefor an action to recover expenses reasonably and honestly incurred as a result of any injury inflicted upon a dependent child.

c) Chastisement

The right to chastise has been described in the Children and Young Persons Act as a right to restrain and control the acts and conduct of an infant and to inflict correction for disobedience by reasonable personal and other chastisement.[51] The parent has the right to inflict moderate and reasonable corporal punishment as an incident of the right of custody[52] and, since the mother now has equal rights with the father in the upbringing of children, the mother also may exercise this right.

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[50] See Eekelaer, supra n.9 at 227.

[51] (1933) 23 Geo. 5 c.12 s.1(7).

[52] R v. Woods (1921) 85 J.P. 272.

Parental punishment will only be lawful if the child is capable of appreciating correction [53] and the parent who exceeds the bounds of reasonableness will be criminally and tortiously liable. But, as the Ontario Law Reform Commission points out, there is very little guiding law on the parent's right to control his child and the Commission concludes that good family relationships and persuasion should be the keynote rather than legal procedures. [54]

d) Religion

The right to choose the religion in which a child is brought up was long the prerogative of the father but again the mother now has an equal say in the matter in England. In Alberta, when a custody order is being sought, it is expressly provided that the court shall make whatever order it thinks fit in order to ensure that the child is brought up in the religion of his parent or guardian. [55] But Ontario and Saskatchewan have specifically protected the father's right over the religious education of his child. The Ontario Infants Act, for example, expressly provides that nothing in the Act will detract from the father's authority over the religious faith in which the child is to be educated. [56]

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53. R. v. Griffin (1869) 11 Cox 402.

54. Ontario Law Reform Commission Report on the Age of Majority and Related Matters 62 (1969).

55. Domestic Relations Act R.S.A. (1970) c.113 s.50.

56. The Infants Act R.S.O. (1970) c.222 s.24.

However, the Canadian Supreme Court has ruled that the right of the father in this matter must give way to the paramount consideration which is the welfare and happiness of the child. [57]

Stress has been placed on the parent's right to determine a child's religion as a factor when awarding custody. [58] On the other hand, the older the child is the less likely the court is to accede to a parental request for change without the child's consent since the child may have acquired his own religious convictions.

The court may make an order inconsistent with an agreement made between parents concerning a child's religious education if it believes the agreement not to be in the best interests of the child. [59] It should also be noted that parents cannot divest themselves of this particular right since it is deemed to be a right exercisable for the benefit of the child. Even when the state has assumed custody of the child the parents' wishes concerning its religious upbringing will usually be observed.

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57. DeLaurier v. Jackson (1934) 1 D.L.R. 790 at 791.

58. Penner v. Penner and Godfrey (1962) 40 W.W.R. 375 (B.C.S.C.).

59. Bateman v. Bateman (1964) 45 D.L.R. (2d) 266 at 273 (Alta S.C.).

e) Miscellaneous Rights

The right of either parent to appoint a testamentary guardian is now well established.[60]

A further parental right which belongs in law to the mother is the right to the Family Allowance.[61]

Parents also have the right to consent to the marriage of an infant child between 16 and 18 years of age in their custody unless the child is a widow or widower. But if a parent refuses consent the child may apply to the court therefor.[62]

In Alberta, while both parents must consent to the marriage of a child under 18 years of age, if the parents are divorced or separated only the person with legal custody need consent.[63] Again, if one parent is dead or mentally incompetent, the other parent may consent alone, or where both are dead or mentally incompetent the guardian may consent.[64] If the child is a ward of the Crown, the Director of Child

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[60] Guardianship of Minors Act (1971) c.3 s.4; Domestic Relations Act (1970) R.S.A. c.113 s.40.

[61] Family Allowance Act (1945) 8 & 9 Geo.6 c.41 s.4(2).

[62] The Marriage Act (1949) 12,13,14 Geo.6 c.76 second schedule; The Marriage Act R.S.A. (1970) c.226 s.18.

[63] The Marriage Act R.S.A. (1970) c.226 s.18(2)(a).

[64] Id. s.18(2)(b)(c).

Welfare must consent.[65] If there are no parents and no guardian no consents are required and this is also the case where the child having been previously married is now divorced or widowed.[66]

While a child may not marry under 16 years of age an exception is made in the case of a female child who is either pregnant or the mother of a living child and in such a case, if the consent of parents or guardian cannot be obtained, the judge may, in his discretion, grant an order dispensing with consent.[67]

4. LOSS OF PARENTAL RIGHTS

Parental rights cease when a child attains majority, on marriage or if serving in the armed forces. They may cease as a result of a court order and where a parent dies the surviving parent becomes sole custodian - unless the deceased parent had appointed a testamentary guardian. But parental rights (and duties) may also be lost where assumed by the State or where voluntarily relinquished, as in adoption. These two circumstances will now be considered.

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[65] Id. s.18(2)(d).

[66] Id. s.18(3).

[67] Id. s.19(2).

a) Assumption by the State

i) In England

In England the Children Act of 1948 empowers the local authority to receive a child into care where abandoned by parents or where parents have shown themselves unfit for any reason to care properly for the child.[68] The criteria used in exercising this power are not prescribed and appear to be left to the discretion of local government officials.[69]

While there is a duty incumbent upon the local authority to take into care children under 17 years of age who appear to need such care, the local authority must endeavour to have such care taken over by a parent, guardian, relative or friend who is, where possible, of the same religious persuasion as the child or who undertakes to bring up the child in such persuasion.[70]

The Children Act provides that "nothing ... shall authorize a local authority to keep a child in their care under this section if any parent or guardian desired to take over the care of the child"[71] but once a child has been taken into care the local authority is not bound to hand over the child on request, regardless of the circumstances.[72]

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[68] Children Act (1948) 11 & 12 Geo. 6 c.43 s.1(1).

[69] Re M. (an infant) (1961) Ch.81.

[70] Id. s.1(3).

[71] Id. s.1.

[72] See Krishnan v. London Borough of Sutton (1970) Ch.181.

The local authority is further empowered by the Act [73] to assume almost all parental rights and authority concerning children taken into care where there are no parents or guardian, where the child has been abandoned, where a parent is physically or mentally unable to care for the child or has shown him or herself otherwise unfit to properly discharge the parental obligations.

Parents may also lose their parental rights to the local authority where a child has committed an offence and a care order is made by the juvenile court under the Children and Young Persons Act. [74] While the local authority acquires the same powers and duties as a parent, it may also restrict the liberty of the child. [75]

It is to be noted that as with care orders under the Childrens Act, there are two parental rights not lost to the parent when a child is taken into care; the right to consent to adoption and the right that the child be continued in the same religion.

Parental rights may also be lost to the local authority in proceedings under the Matrimonial Causes Act of 1965 [76] where, in matrimonial proceedings, the court deems it to be either impracticable or undesirable that either parent or other person be granted custody.

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[73] Children Act (1948) 11,12 Geo. 6 c.43 s.2.

[74] 23 Geo. 5 c.12 ss.1(3)(c), 7(7)(a), 20(1).

[75] Id. s.24(2).

[76] C.72 s.36. A similar power is conferred on a magistrates' court under the Matrimonial Proceedings (Magistrates' Court) Act 1960 ss.2(1)(e), 3. The Family Law Reform Act (1969) s.7(2),(3) also enables the High Court to commit a ward of court to the care of the local authority.

A fairly common device in England where parents are unable or unwilling to fulfill their parental obligations is to make a child a ward of court. The court then appoints a guardian (who may be a parent) and both child and guardian remain under the control of the court. The guardian is under a duty to obey all directions of the court and may seek the help of the court when required. One of the advantages of this procedure is that where a parent is made guardian he or she has the custody of the child subject to the court's supervision and therefore only loses the parental rights in part.[77]

ii) In Canada

While the equitable right of the Crown as *parens patriae* to make a child a Ward of Court exists also in Canada, it appears not to be invoked as often as in England.[78]

In all provinces of Canada where parents are unable or unwilling to provide a minimum standard of care and protection for a child the state may intervene.[79] In Alberta, for example, legislation provides[80] that a neglected child may be removed from parental control [81] and placed in a shelter or foster home [82] in which case the apprehending authority becomes responsible for the care, maintenance and well-being of the child. [83] It is provided however, that where it appears to be in the interest of the child and in the public interest, a child found to be neglected may be returned to the care of the parent but under the supervision of the department of the Director of Child Welfare. [84]

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[77] For a discussion on Wardship see *Bevan*, *supra* n.9 at 411.

[78] *Ontario Law Reform Commission*, *supra* n.54 at 64.

[79] For a discourse covering all provinces see Fraser, *Children in Need of Protection, in Mendes Da Costa (ed) 1 Studies in Canadian Family Law 67 (1972)*. See also Child Welfare Act (R.S.A. (1970) c.45; Child Welfare Act R.S.O. (1970) c.64 s.26 (am.1971 c.98); Child Welfare Act R.S.M. (1970) c.c80 s.12(4); Children's Protection Act N.B.S. (1957) c.6 s.7(1); Child Welfare Act R.S.S. (1965) c.268 s.18; Child Welfare Act R.S.N.S. (1967) c.31 s.33; Protection of Children Act R.S.B.C. (1960) c.303 s.8(b); Children's Protection Act P.E.I.R.S. (1951) c.24 s.3; Child Welfare Act R.S.N. (1970) c.37 s.11.

[80] Child Welfare Act R.S.A. (1970) c.45 as amended.

Provision for making a neglected child a ward of the Crown is also made in the Alberta statute. An order may be made for either temporary or permanent wardship [85]; in either case custody is transferred from the parents to the Director of Child Welfare. In the case of temporary wardship, the rights of guardianship vested jointly in the parents by the Domestic Relations Act, [86] are transferred to the Director who, to the exclusion of any other guardian, may exercise all rights of a guardian with the exception of consent to adoption. [87] With regard to orders of permanent wardship, the Director acquires all parental rights and responsibilities and becomes "the sole legal guardian of the person and estate of the infant."[88] It is further enacted that "due regard shall be given to religious faith in the placement of a child made a temporary or permanent ward of the Crown."[89]

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[81] Id. s.15.

[82] Id. s.16.

[83] Id. s.17.

[84] Id. s.23.

[85] Id. ss.24,25.

[86] R.S.A. (1970) c.113 s.37.

[87] Child Welfare Act R.S.A. (1970) c.45 s.31(1).

It is also possible for the parent having custody to voluntarily relinquish it to the Director, where through illness or misfortune the parent cannot look after the child or where unable to provide for the special needs of an individual child.[90]

b) Adoption

i) In England

Adoption has been described as "a legal method of creating between a child and one who is not the natural parent of the child an artificial family relationship analogous to that of parent and child."[91] The common law does not permit either parent to divest himself or herself of the parental rights and duties by voluntary agreement.[92] But the need for child adopters, which evinced itself after World War I, lead to the first Adoption of Children Act in 1926. Changes were made in successive acts and the present law is to be found in the Adoption Act of 1958, as amended.[93]

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[88] Id. s.31(2).

[89] Id. s.34(6).

[90] Id. s.35.

[91] Tomlin Committee Report on Adoption (1925) Cmnd. 2401 at 3.

[92] Brooks v. Blount (1923) 1 K.B. 257.

The Adoption Act provides for a complete transfer of all parental rights and duties from the natural parents to the adopters; the rights and duties of the natural parents vesting in the adopting parents as if the child had been born to the latter in lawful wedlock.[94] It may also be noted that any existing custody or maintenance orders automatically cease on adoption.[95]

It is of the essence that the relinquishment of parental rights and duties be voluntary and so the consent of each parent or guardian must be obtained before adoption can take place. But such consent will be dispensed with where the court is satisfied that a child has been abandoned, neglected or persistently ill-treated or the parents have persistently failed to discharge the parental obligations or where a

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93. Adoption Act (1958) 7 Eliz. 2 c.5.

94. Id. s.13(i) which provides:

> "Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian --- to consent or give notice of dissent to marriage, shall be extinguished."

For a detailed account of adoption provisions see Bevan, supra n.9 at 309; Bromley, supra n.9 at 246.

95. Crossley v. Crossley (1953) 1 All E.R. 891.

parent cannot be found, is incapable of giving consent or is withholding consent unreasonably.[96]

For some years work has been in progress in England to reform and consolidate child welfare law, including adoption law, as a result of which the Children Bill is now before Parliament.[97] This Bill proposes a new procedure enabling a parent to relinquish his or her parental rights in favour of an adoption agency by means of a court order declaring the child "free for adoption"[98] whereupon the parental rights and duties will vest in the adoption agency. The child's mother cannot make such an agreement within six weeks after the birth. Furthermore, within twelve months of being declared free for adoption, if the child has not in fact been adopted or placed for adoption, the parent may apply to the court for a revocation of the order.[99]

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[96] Adoption Act (1958) 7 Eliz. 2 c.5 s.5. In Re W (1971) A.C. 682 it was held that to prove that consent was unreasonably withheld, it will suffice if the parent was not acting reasonably in all the circumstances; it was not necessary to show culpability, failure of parental duty or potential damage to the child.

[97] The Children Bill 1974.

[98] *Id.* C-1 12(1).

[99] *Id.* 16(1). For further detail on the Children Bill, see Stone, *Recent Developments in the Law of Adoption and Long-term Fostering in the United Kingdom*: Paper presented to the Conference on International Society for Family Law at the Free University of Berlin, April 1975.

A novel proposal in the Children Bill is the introduction of the "custodianship order". This is intended to be a half-way measure between adoption, with its irrevocable transfer of all parental rights and duties, and placing a child in local authority care. It will be a revocable order vesting the legal custody of the child in the custodian, who may be a relative or friend but not a parent.

ii) In Canada

In the Provinces of Canada similar provisions exist with regard to adoption. For example, in Alberta the Child Welfare Act provides that a parent cannot, by mere agreement with another person, surrender a child to that other person for purposes of adoption: a parent wishing to relinquish all parental rights and duties must do so through the Director of Child Welfare.[100]

Before a child may be taken for adoption the consent of the guardian must be obtained[101] unless the guardian is found to be insane, incompetent or unfit to give consent or where the guardian, being under a duty to provide care and maintenance for a child, has neglected so to do.[102] In addition, the judge is given a wide discretion to dispense with a guardian's consent "for reasons that appear to him sufficient.[103] The consent of the child must be obtained if the child is over 14 years of age, and again the judge may dispense with such consent "for reasons appearing to him to be sufficient."[104] Again, the effect of an adoption order is to sever the existing parent-child relationship and create such a relationship between the child and its adoptive parents as if the child had been born to them in lawful wedlock.

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[100] Child Welfare Act R.S.A. (1970) c.45 s.66.

[101] Id. s.54(1).

[102] Id. s.54(4)(a),(b).

[103] Id. s.54(4)(c).

[104] Id. s.55.

c) Suggested Reforms

Eekelaer is of the view that where the principle prevails that the child's welfare is paramount, it is not easy to discern precisely what parental rights are left.[105] He believes that "... (the) concept of parental rights may be coming into collision with the development of countervailing rights in children."[106]

As a fundamental principle the paramountcy of the child's welfare is fine but in practice it may not always result in justice all round. The essence of the difficulty is the necessarily subjective nature of the assessment of what is in the best interests of the child. The obvious example is where a local authority, on the advice of its social worker, removes a child from its home and places it in care. The mother's (and father's) rights have been overridden on the ground that the child's welfare comes first. The pendulum may have swung too far.

It is suggested that in matters of custody, or adoption, or placing in care, the absolute priority presently given to the welfare of the child be reconsidered in order to place more emphasis on parental rights. This recommendation might not be defensible if there were an infallible yardstick for measuring the child's welfare but it is submitted that such a change of attitude might be possible without resulting in any detriment to the child.

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[105] See Eekelaer, Deprivation of Parental Rights: Legislative Contrasts in England, Wales, Australia and Canada (1973) 4 Fam. L.Q. 381. Also Stone, supra n.99 at 3, 15.

[106] Eekelaer, supra n.9 at 211.

5. PARENTAL DUTIES

a) Maintenance

i) The Duty to Maintain

At common law there was no direct liability on the father to maintain his legitimate child [107] and it would appear that this common law protection extended to the mother on acquiring equal parental rights with the father. However, the child has long been protected by statute, such protection being presently embodied in Social Security legislation in England and provincial legislation in Canada which provides that a man and a woman are each liable to maintain those of their children under 16 years of age. [108] Because of this primary liability to maintain, both father and mother are under a duty to contribute to the maintenance of a child placed in the care of a local authority. [109] They are also under a duty to provide for the maintenance of a child made a ward of court. [110]

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[107] But it was held in *Bazeley* v. *Forder* (1868) L.R. 3 Q.B. 559 that the wife's agency of necessity extended to the purchase of necessaries for her husband's children.

[108] National Assistance Act (1948) 11 & 12 Geo.6 c.29, s.42; Ministry of Social Security Act (1966) c.20, s.22; The Maintenance Order Act R.S.A. (1955) c.188 s.3(2); Criminal Code R.S.C. (1970) c.34 s.194 See generally *Bromley*, *supra* n.9 at 302; *Bevan*, *supra* n.9 at 453; Barton, *The Enforcement of Financial Provisions in Graveson and Crane (ed.) Century of Family Law* 352 (1957).

[109] The Maintenance Order Act R.S.A. (1955) c.222, s.5.

[110] Family Law Reform Act (1969) s.6; Child Welfare Act R.S.A. c.45, s.26.1.

The State, however, might be deemed to have assumed a certain amount of responsibility for the maintenance of children where the parents have difficulty in providing a minimum standard of care. Hence the Supplementary Benefits in case of need and Family Allowance Schemes:[111] it is to be noted that the mother can only claim the former if living apart from her husband.[112]

ii) Child Maintenance in English Matrimonial Proceedings

Either mother or father, when seeking a matrimonial order, may apply to a magistrate's court for an order for maintenance of any child of the family.[113] If the child is not a child of the applicant the court must take into consideration the extent to which the applicant assumed responsibility for maintenance of the child in question; also, the liability of any other person for the child's maintenance.[114] Much controversy rages over the duty of a spouse to provide for maintenance

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111. Bevan, supra n.9 at 506 contends that the basis of the Family Allowance Scheme is not the resources of the family and the need for support. But it is submitted that by making these allowances taxable there is an intent to benefit the poor more than the well-off.

112. Bevan, supra n.9 at 505.

113. Matrimonial Proceedings (Magistrates' Courts) Act 1960 s.2(1)(h) as amended by the Maintenance Orders Act 1968 s.1.

114. Id. s.2(5). These considerations also apply under High Court proceedings.

of a child of the family which is not his or her own child;[115] the concept of "child of the family" having come in for much criticism.

The High Court has wider powers to make financial provisions for children than has a magistrate's court. Orders may be made in proceedings for divorce, nullity or judicial separation at any stage pending suit or when a decree is granted or at any time thereafter.[116] The order may be for unsecured periodical payments, secured periodical payments or a lump sum payment.[117] Such orders may still be made for a child even if the proceedings are dismissed.[118]

When making orders for financial provision for children, the court must not exercise its powers in such a way as to punish the spouse who caused the marriage to break down.[119] Furthermore, the courts' powers cannot be restricted by any agreement between the parties.[120]

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115. See Cretney, Looking After the Children: Recent Developments (1972) 116 Sol. J. 232; Snow, "Child of the Family", Liability to Maintain and Supplementary Benefits (1975) 5 Fam. L. 72; Samuels, Financial and Proprietary Provisions (1975) 5 Fam. L. 10; Samuels, Duty to Maintain of Assuming Stepfather (1962) 26 M.L.R. 92.

116. Matrimonial Causes Act (1973) c.18, s.23.

117. Id. s.23(1).

118. Id. s.23(2).

119. Attwood v. Attwood (1968) P. 591, 595.

120. Bennett v. Bennett (1951) 2 K.B. 572.

Financial provision for a child of the family may also be ordered against a mother who has wilfully neglected to provide, or to make a proper contribution towards, reasonable maintenance of the child. [121]

iii) Child Maintenance in Canadian Matrimonial Proceedings

Each province has its own legislation in this regard [122] but concerning divorce proceedings there are federal provisions relating to child maintenance. Where a petition for divorce is presented the court may make an order for child maintenance and upon granting a decree nisi the court may order either spouse to secure or pay a lump sum or make periodic payments for the children of the marriage. [123] Under the Divorce Act, both parents are jointly and severally responsible for maintaining the "children of the marriage". The position is not one of primary liability on the father with a secondary liability on the mother. The obligation to provide support is placed equally upon both parents, subject to their relative financial abilities. [124]

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[121] Matrimonial Causes Act (1973) c.18 s.27(b).

[122] For example, The Domestic Relations Act R.S.A. (1970) c.113; Wives' and Childrens' Maintenance Act R.S.B.C. (1960) c.409 s.3; Wives' and Childrens' Maintenance Act R.S.M. (1970) c.W170 s.17; Deserted Wives and Childrens Act R.S.N.B. (1952) c.61 as amended; Deserted Wives and Childrens Act R.S.O. (1970) c.128; Deserted Wives and Childrens Act R.S.S. (1965) c.341.

[123] The Divorce Act R.S.C. (1970) c.D-8 ss.10,11.
In Bogdane v. Bogdane (1974) 38 D.L.R. (3d) 767 such an order was refused concerning a child born after the decree absolute. The court held that "upon granting a decree nisi" meant that it had no jurisdiction thereafter.

In Hansford v. Hansford (1973) 9 R.F.L. 233 it was held that where the wife bargained on the fact that she did not need child maintenance, payments were to be made into court to be available for the child when required.

[124] Paras v. Paras (1971) 1 O.R. 130 (C.A.), (1972) 8 R.F.L. 172.

A "child" for the purposes of the Divorce Act means any person to whom the husband and the wife stand in loco parentis, or any person of whom either party is the parent and to whom the other party stands in loco parentis.[125] The term "in loco parentis" is not to be construed as meaning that there is a legal obligation; merely having assumed the duties of a parent will suffice,[126] but not if such an assumption is of a temporary nature.[127]

"Children of the marriage" is also defined in section 2 of the Divorce Act. The term is said to mean each child of a husband and wife who at the relevant time is either under sixteen years of age or, having attained that age, is still under the charge of the parents because he is unable through illness, disability or other cause to provide for himself.[128] This term does not include children born to the parents but adopted by a third party.[129]

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125. The Divorce Act R.S.C. (1970) c.D-8 s.2.

126. Royal Trust Co. v. Globe Printing Co. Ltd. et al. (1934) O.W.N. 547.

127. Hock v. Hock (1970) 13 D.L.R. (3d) 356.

128. On the meaning of "child" and "children of the marriage" see Khetarpal, supra n.33 at 223; MacDonald and Ferrier, Canadian Divorce Law and Practice (1975) ss. 2.10 - 2.14.

129. Johnston v. Johnston (1969) 2 O.R. 198.

With regard to the phrase "or other cause", it appears to be left to the discretion of the court whether or not maintenance should be provided when a child is over sixteen years of age, but still attending school,[130] and it further appears that maintenance will not normally be ordered for a child attending university.[131]

The lowering of the age of majority in Canadian provinces[132] could have been construed as altering the meaning of "child" and "children of the marriage" but in some provinces where the point has been at issue it has been held that this is not so.[133]

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[130] Hillman v. Hillman (1972) 31 D.L.R. (3d) 44 (Ont.); Tapson v. Tapson (1970) 1 O.R. 521.

[131] Madden v. Madden (1970) 14 D.L.R. (3d) 100. But see Re C and C (1970) 14 D.L.R. (3d) 477 where held that after decree nisi is granted there may be an obligation under section 11 of the Divorce Act concerning such a child attending university.

[132] The age of majority in Alberta, Manitoba and Ontario is 18 but it is 19 in British Columbia, Saskatchewan, Nova Scotia and Newfoundland: Age of Majority Act, Alta. Stat. (1971) c.1; Age of Majority Act, B.C. Stat. (1970) c.2; Age of Majority Act, Man. Stat. (1970) c.91; Age of Majority and Accountability Act, Ont. Stat. (1971) c.98; The Coming of Age Act, Sask. Stat. (1970) c.8; Age of Majority Act N.S. Stat. (1970-71) c.10; The Minors (Attainment of Majority) Act, Nfld. Stat. (1971) No. 71.

[133] Hillman v. Hillman, supra n.130; Vlassie v. Vlassie (1972) 26 D.L.R. (3d) 471 (Man.); Jackson v. Jackson (1972) 29 D.L.R. (3d) 641 (Sup. Ct.); Petty v. Petty (1973) 1 W.W.R. 11 (Alta).

It is important to note that the common law meaning of "child", a person who has not yet reached the age of majority, is not applicable here. The terms under consideration are used in the Divorce Act to denote a family relationship rather than a state of infancy.[134]

The Domestic Relations Act in Alberta imposes a joint duty of support by providing that where a married person has obtained a judgment of judicial separation or a decree of divorce on adultery of the spouse, the property of the guilty spouse may be settled for the benefit of the children of the marriage.[135] Where a judgment for restitution of conjugal rights is obtained the spouse against whom the judgment is obtained may have his or her property settled or earnings periodically paid for the benefit of the children of the marriage.[136]

Where a married woman has been deserted or living apart from her husband on account of his cruelty or his refusal or neglect to provide her with food and necessaries when able to do so, she may apply to a justice of the peace who may order the husband to make regular payments for the maintenance of the children and the wife. [137] Where a wife has not been deserted but has her husband's children in her care, she may apply to a magistrate for an order restricted to maintenance of the children. [138] Again, where a divorced woman has in her care or custody children of herself and her divorced husband and there is no court order for maintenance of the children, she may apply to a magistrate for an order restricted to the maintenance of the children. [139]

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[134] Jackson v. Jackson supra n.133.

[135] Domestic Relations Act R.S.A. (1973) c.113 ss.22,24 as amended. (Until 1973 only the property of a guilty wife, not a guilty husband, could be so settled).

[136] Id. s.25 (Again, until 1973 only the wife's property or earnings could be thus disposed of.)

b) The Mother's Duty to Protect

At common law the duty of the mother to protect the child from physical or moral harm was the same as that of the father and, indeed, of any person having the care of a child. But the duty extended only to those children unequipped to look after themselves so that a child approaching majority might not be so protected. [140] A series of statutes put the matter of child protection on a statutory footing. [141] The modern position is still embodied in section I of The Children and Young Persons Act of 1933 which provides:

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137. Id. s.27(2).

138. Id. s.27(5).

139. Id. s.27(7).

140. R v. Shepherd (1862) Le. & Ca. 147.

141. Poor Law Amendment Act (1868) s.37.
Prevention of Cruelty to, and Protection of, Children Act (1889).
Prevention of Cruelty to Children Act (1894).
Prevention of Cruelty to Children Act (1904).

> If any person who has attained the age of 16 years and has the custody, charge or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement) that person shall be guilty of a misdemeanour and shall be liable .... [142]

Most charges are for neglect, a term which may cover many things. One aspect singled out by the Act is causing the death of a child under the age of 3 by overlying it in bed whilst drunk. [143] There are a host of other provisions which a mother or other person having the care of a child must observe and concerning which criminal sanctions exist: those forbidding assaults, child-stealing, exposing a child under 12 to risk of burning, failure to provide for safety of children at entertainments, prohibiting presence of children in a bar, purchase of tobacco, possession and handling of firearms by juveniles, tatooing of children under 18, and so forth.

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[142] The penalties imposed by this section are up to two years imprisonment or a fine on conviction or indictment: on summary conviction up to 6 months imprisonment or a fine. More severe penalties (up to 5 years imprisonment) are imposed where it can be proved that a person convicted under this section knew of money accruing in the event of the child's death.

[143] Children and Young Person Act (1933) 23 Geo. 5 c.12 s.1(2)(b).

Of particular relevance to the mother in this context is the duty to protect the unborn child. Procuring or attempting to procure abortion is punishable with imprisonment for life.[144] A mother may also be found guilty of conspiring to procure her own miscarriage even when not pregnant[145] or of aiding and abetting in the commission of abortion.[146] Unlawfully administering a "poison or other noxious thing" or using any instrument to procure a miscarriage is also an offence.

The Abortion Act of 1967 modified the above principles by providing for lawful termination of a pregnancy where either the mother's life or her physical or mental health was at risk, or where other children would be adversely affected or where the child if born would be seriously handicapped.[147]

Another aspect of the mother's duty to protect her child is to be found in the Infanticide Act of 1938 where the rigours of the law relating to murder are modified. It is provided[148] that where a woman

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144. Offences Against the Person Act (1861) s.58.

145. R. v. Whitchurch (1890) 24 Q.B.D. 420 (C.C.C.R.).

146. R. v. Sockett (1908) 1 Cr. App. Rep. 101 (C.C.A.).

147. The Abortion Act (1967) c.87 s.5(2).

148. Infanticide Act (1938) 1,2 Geo.6 c.36 s.1(1).

wilfully causes the death of her child under one year, she will not be guilty of murder but of infanticide if, at the time, her mind was disturbed as a result of childbirth. The consequences of infanticide are similar to those of manslaughter.

The trend is now away from punitive action against a convicted parent and attempts are ofteh made to deal in a therapeutic manner with the family as a whole: removal of a child from the home being a last resort.[149]

c) Education

While the education of a child may also be regarded as a right, the duty to ensure that a child receives adequate education is perhaps of greater significance. There is a statutory duty encumbent upon all parents of children of school age to see that such child obtains efficient, full-time education suitable to his age, ability and aptitude by regular attendance at school.[150] Regard will be had to the parents' preference in the matter of religious schools. Failure to comply with an attendance order will make the parents criminally liable.[151] Such a failure can also lead to the bringing of a child before the court as being in need of care or control.[152]

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[149] See Fraser, *Children in Need of Protection in Mendes da Costa (ed) 1 Studies in Family Law* 67 (1972).

[150] The Education Act (1944) Geo. 6 c.31 s.36; The School Act R.S.A. (1970) c.329 s.133; Schools Administration Act R.S.O. (1970) c.424 s.6(5); Public Schools Act R.S.B.C. (1960) c.319 s.121; School Attendance Act R.S.M. (1970) c.S20 s.2; School Attendance Act R.S.N. (1970) c.345 s.6; Education Act R.S.N.S. (1967) c.81 s.79; School Act R.S.P.E.I. (1951) c.145 s.1; School Attendance Act R.S.S. (1965) c.186 s.3.

[151] The Education Act *Id.* s.40(1).

[152] Children and Young Persons Act (1969) s.1.

6. PARENTAL LIABILITY

At common law a parent was not liable for crimes committed by his or her child unless the child had been aided or abetted by the parent. But where the child's crime is due to parental influence or lack of supervision, statute now provides that in certain circumstances fines, damages or costs may have to be borne by the parent.[153]

A parent, qua parent, will never be liable for a child's contracts[154] but there may be liability on ordinary principles of agency where the parent authorized the child to make the contract.

The question of a parent's liability for a child's tort is more complicated.[155] Again, a parent, qua parent, is not liable for a child's tort but may be so liable by authorizing the tort, or where the child acts in the capacity of a servant, or where the parent has been negligent in failing to properly supervise and control the child's activities.[156] In negligence cases, the parent, to be liable, must owe the injured person a duty to control the child; that is, there must be knowledge, actual or imputed, that the child's conduct would endanger the person or property of others. If it is not reasonable to foresee the danger, there is no liability.

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[153] Id. s.55.

[154] Mortimore v. Wright (1840) 6 M. & W. 482.

[155] See Alexander, Tort Liability of Children and Their Parents in Mendes Da Costa (ed.) 2 Studies in Family Law 845 (1972); Bromley, supra n.9 at 310.

[156] For example, in Newton v. Edgerly (1959) 3 All E.R. 337 where accidental injury resulted from a parent allowing a 12-year-old to have a shot gun. It was held that the parent was personally liable in negligence for he should have foreseen the possibilities.

As to which parent may be liable for a child's tort, this would appear to depend on the facts of the case. For example, where the father gives a son a shotgun, the duty of care rests with the father; but where a mother accompanying a young child to school does not exercise reasonable control, liability for a resultant accident lies with her. Again, in Alberta, parents are made jointly and severally liable for damage caused by their child to school property.[157]

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[157] The School Act R.S.A. (1970) c.329, s.167. See also Public Schools Act R.S.B.C. (1960) c.319 s.124.

CHAPTER SEVEN THE MARRIED WOMAN'S RIGHT TO MATRIMONIAL RELIEF: DISSOLUTION OF MARRIAGE

1. INTRODUCTION

Present legislation concerning matrimonial relief is, in many respects, similar in England and Canada. Both countries have now embraced the concept of marriage breakdown which recognizes the existence of irretrievable breakdown of marriage irrespective of any matrimonial offence. Present legislation is recent in England and so no great move for reform exists in that country but as will be seen in this chapter the Canadian Law Reform Commission's Working Paper shows that considerable dissatisfaction exists in Canada today with present divorce law.

The various forms of matrimonial relief which are available to the married woman in England and Canada will now be examined. It will be remembered that while divorce comes within the federal jurisdiction in Canada, other forms of matrimonial relief are matters for the provincial legislatures and in the latter regard primary consideration will be given to Alberta.

2. NULLITY

The rules upon which a decree of nullity will be granted in the common law provinces of Canada are not to be found in a Canadian statute.[1] They are based upon the English law as declared in the first Matrimonial Causes Act of 1857.[2] In examining the law regarding nullity it is essential to distinguish void marriages from voidable marriages.

a) Void Marriages

A void marriage is one where there is an inherent defect of such a nature that the court will consider no real marriage to have taken place: it is void *ab initio* and the woman is deemed never to have acquired the status of married woman. The recent Matrimonial Causes Act sets out the current position in England regarding void marriages. It provides that a marriage will be void for consanguinity; for lack of age; where the requirements of the Marriages Act concerning the formation of the marriage have not been observed; for bigamy; where the parties are of the same sex;

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[1] See generally Bromley, *Family Law* 58 (4th ed.) 1971; Davies, *Matrimonial Relief in English Law in Graveson and Crane (ed.) A Century of Family Law* 311 (1957); James, *The English Law of Marriage in Graveson and Crane (ed.) A Century of Family Law* 20 (1957); Hahlo, *Nullity of Marriage in Mendes Da Costa (ed.) 2 Studies in Canadian Family Law* 652 (1972); Khetarpal, *Family Law* (1975) 7 Ottawa L. Rev. 180: There has been controversy as to whether the Canadian Divorce Act of 1968 had superceded nullity petitions but in recent cases, *Jackson* v. *Jackson* (1972) 2 W.W.R. 321 (B.C.S.C.) and *Liptack* v. *Liptack* (1974) 1 W.W.R. 108 (Alta. S.C.), it was held not to be so.

[2] 20 & 21 Vict. c.85.

and where, in the case of a polygamous marriage, either party was domiciled in England at the time of marriage.[3]

The only apparent innovation in this Act is the provision which would render void ab initio any marriage ceremony between two members of the same sex. But as this is in keeping with the classic definition of marriage,[4] as being between one man and one woman, there is no real change in this provision.

By omission the English Act appears to indicate that lack of true consent will no longer be a valid reason in England for claiming that a marriage was void. Formerly it was held that a marriage would be void where mistake, either as to the nature of the ceremony or the identity of one's partner, vitiated the consent.[5] Similarly in cases of duress where it has been held that extreme fear could render a marriage void.[6]

b) Voidable Marriages

A voidable marriage is one with less severe defects so that the marriage will subsist as valid until the court annuls it. The Matrimonial Causes Act declares that marriages will be voidable where, through the incapacity of either party or the wilful refusal of the respondent, the marriage has not been consummated; where there was no valid consent owing to duress, mistake, unsoundness of mind or other cause; where either party at marriage was suffering from continuous or intermittent mental disorder such as to render him or her unfitted for marriage; where the respondent was suffering from a communicable form of veneral disease or was pregnant per alium at the time of the marriage.[7]

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[3] (1973).c.18 s.11.

[4] Hyde v. Hyde and Woodmansee (1866) L.R. 1 P. & D. 130.

[5] Way v. Way (1950) P.71; Sykiotis v. Sykiotis (1966) 2 O.R. 428.

[6] Scott v. Sebright (1886) 12 P.D. 21; Cooper v. Crane (1891) P.369.

The Act also provides for certain bars to relief when a nullity petition is based on a claim of voidable marriage. A petition will be barred where the petitioner was aware of grounds for relief but misled the respondent as to his intentions in the matter;[8] where it would be unjust to the respondent to grant the decree;[9] where proceedings were not instituted within three years from the date of marriage in all cases except that of failure to consummate the marriage; and where, in the case of venereal disease or pregnancy per alium, the petitioner at the time of marriage was aware of the facts alleged.[10]

With regard to incapacity to consummate the marriage, the Act is silent as to whether the incapacity must be incurable,[11] or whether it might be of psychic rather than physical origin.[12] In Canada it was recently held that annulment should not be granted on this ground where the wife had refused

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7. (1973) c.18 s.12.

8. Id. s.13(1)(a).

9. Id. s.13(1)(b).

10. Id. ss.13(2), (3).

11. See S. v. S. (1963) P. 162 where held that petitioner must prove an incurable inability to consummate.

12. See Hardwick v. Fox (1971) 3 R.F.L. 153 where held that normally impotence quoad hanc would not suffice.

minor surgery to have a physical disability removed.[13]

There will no doubt continue to be diverse opinions as to what constitutes "valid consent" for the purposes of voidable marriage. Immigration cases are of special interest here; where one party marries another for the sole purpose of attaining immigration status and with the intent of afterwards securing a decree of annulment of the marriage. The cases indicate however that the mental reservations of either party will not affect the validity of the marriage.[14] However, cases have been distinguished where fear was held to have negated the consent.[15]

c) The Effects of a Decree of Nullity

Where a marriage is void either party may remarry, with or without a decree of annulment, and children of a void marriage will not be illegitimate providing the parents believed themselves to have been lawfully married and the marriage was lawfully registered and recorded.[16]

It is to be noted that in the case of a voidable marriage, remarriage before the decree of annulment is made absolute constitutes bigamy and that a voidable marriage can be ratified whereas this is not so of a void marriage.

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13. D. v. D (1973) 36 D.L.R. (3d) 17 (Ont.).

14. Silver v. Silver (1955) 2 All E.R. 614; Deol v. Deol (1971) 23 D.L.R (3d) 223 (B.C.S.C.). But see McKenzie v. Singh (1973) 29 D.L.R. (3d) 380 (B.C.S.C.) where contrary conclusion reached on the ground that the marriage had not been entered into in good faith as required by the Marriage Act.

15. H. v. H. (1953) 2 All E.R. 1229. See also Davies, Duress and Nullity of Marriage (1972) 88 L.Q.R. 549.

16. The Legitimacy Act R.S.A. (1970) c.205 ss. 3, 5.

There are various advantages to obtaining a decree of nullity for the status of the parties is then placed beyond doubt. The decree is both a judgment in rem and in personam in that no person can allege that the marriage is valid; in addition, ancillary relief is available. A further practical advantage to this decree is that where money or property has been distributed in the belief that the marriage was valid, the decree will not have retroactive effect with regard to such property.[17]

3. JUDICIAL SEPARATION

a) Grounds for Granting a Judgment

In England a petition for judicial separation may be presented to the court by either spouse when the petitioner finds it intolerable to live with a spouse who has committed adultery; where the other spouse has behaved in such a way that the petitioner cannot reasonably be expected to live with him or her; where the petitioner has been deserted for a continuous period of at least two years immediately preceding the filing of the petition or the parties have lived apart for such a period and the respondent consents to the granting of a decree; and where the parties have lived apart for the preceding five years, whether or not there is consent to the granting of the decree.[18]

In Alberta a judgment of judicial separation may be obtained on the petition of either wife or husband alleging that the other spouse has, since the marriage, been guilty of adultery, cruelty, desertion for at least two years without reasonable cause or desertion because a spouse failed to comply with a judgment for restitution of conjugal rights, sodomy or bestiality or an attempt to commit either offence.[19]

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[17] Re Eaves, Eaves v. Eaves (1939) 4 All E.R. 260.

[18] Matrimonial Causes Act (1973) c.18 s.17(1).

The grounds for judicial separation in England being the same as the grounds for divorce, except that it is not necessary to show that the marriage had broken down irretrievably, these grounds will be discussed later when considering divorce.

In comparing the grounds for judicial separation in England and Alberta it is seen that the grounds are wider in England, being in line with the recent divorce legislation. In Alberta they are still basically as they were in the Domestic Relations Act of 1955 and do not therefore incorporate the non-fault provisions contained in current divorce legislation in Canada. They have, however, been updated so as to provide equality of treatment as between husband and wife. It will be noted that England has abolished judgements for restitution of conjugal rights,[20] failure to comply with such in Alberta still being a ground for judicial separation.

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[19] Domestic Relations Act (1970) R.S.A. c.113 s.7(1) as amended by the Attorney General Statutes Amendment Act (1973) c.61. British Columbia is the only other Province with express legislation on Judicial Separation; Family Relations Act (1972) c.20 s.10.

[20] Matrimonial Proceedings and Property Act (1970) c.45 s.20. British Columbia has also abolished this suit, Family Relations Act (1972) c.20 s.4, but it is retained in Alberta and provided for by ss.3-5 of the Domestic Relations Act R.S.A. (1970) c.113 as amended.

b) Factors to be Considered

The English Act imposes a duty on the court to enquire, as far as it reasonably can, into the facts alleged by both parties but it is specifically stated that the court shall not be concerned to consider whether the marriage has broken down irretrievably; if it is satisfied on the evidence that one of the specified grounds exists a decree must be granted.[21]

As in petitions for divorce, the English statute provides for the encouragement of reconciliation of parties to proceedings for judicial separation and also for the court to assist with agreements or arrangements made by the parties in these proceedings.[22] There is no such provision in Alberta.

Both English and Alberta Acts give specific guidance when adultery is involved. The English Act says that a petition cannot be brought on the ground of adultery where the petitioner, knowing of the adultery, lived with the respondent for more than six months thereafter.[23] With regard to resumed cohabitation of a lesser period it is provided that it shall be disregarded in determining whether the petitioner finds it intolerable to live with the respondent when a petition for judicial separation on the ground of adultery is filed.[24]

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[21] Matrimonial Causes Act (1973) c.18 s.17(2).

[22] Id. s.17(3).

[23] Id. ss.17(1), 2(1).

[24] Id. ss. 17(1), 2(2).

The Alberta Act declares that a petition for judicial separation on the ground of adultery shall not be granted in any case where the petitioner has been accessory to or has connived at or been guilty of conduct conducing to the respondent's adultery.[25]

The Alberta Act also gives guidance as to what constitutes cruelty in a petition for judicial separation. The Domestic Relations Act says:[26]

> "Cruelty" in this Act is not confined in its meaning to conduct that creates a danger to life, limb or health, but includes any course of conduct that in the opinion of the Court is grossly insulting and intolerable, or is of such a character that the person seeking the separation could not reasonably be expected to be willing to live with the other after he or she has been guilty of such conduct.

The question of whether cruelty in a petition for judicial separation is the same as or different from cruelty in divorce proceedings has given rise to much difficulty in Canada - particularly since the new divorce legislation in 1968. In Pettigrew v. Pettigrew[27] it was held that cruelty for judicial separation was similar to that now required for divorce but the position is by no means clear.[28] The English statute having abandoned the term "cruelty" and replaced it by the provision that the petitioner cannot reasonably be expected to live with the respondent because of the latter's behaviour, the old definitions of cruelty have lost their significance in England: the test in England is now the reasonableness of the respondent's behaviour.

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[25] The Domestic Relations Act (1970) c.113 ss.9(a), 10.

[26] Id. s.7(2).

[27] (1969) 1 D.L.R. (3d) 471.

[28] See Mildon v. Mildon (1971) 1 Ont. 390 and Marsh v. Marsh (1974) 2 Ont. 436 where a contrary view is indicated.

c) Effects of Judicial Separation

Both the English and Alberta Acts provide that on the granting of a decree of judicial separation neither spouse is under a duty to cohabit with the other.[29] They also provide that, with regard to the devolution of property of a spouse dying intestate while a decree of judicial separation is in force, such property shall devolve as if that spouse had been predeceased by the survivor.[30]

As was seen earlier,[31] in Alberta either spouse in an action for judicial separation may seek to recover damages from the person who committed adultery with the other spouse but the action for damages will be dismissed if the petitioner has been accessory to or connived at or condoned or colluded in the adultery. Moreover, if the petitioner has been guilty of adultery or neglect or misconduct conducing to the adultery or cruelty or desertion or undue delay in presenting the petition the court may dismiss such an action for damages.[32]

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[29] Matrimonial Causes Act (1973) c.18 s.18(1). The Domestic Relations Act (1970) c.113 s.11(a).

[30] Matrimonial Causes Act (1973) c.18 s.18(2). The Domestic Relations Act (1970) c.113 s.12 as amended by the Attorney General Statutes Amendment Act (1973) c.61.

[31] Chapter Three where also seen that damages for adultery were abolished in England in 1970.

[32] The Domestic Relations Act (1970) c.113 ss.14, 15 as amended.

It has already been seen that after a judgment of judicial separation the wife acquires an independent domicile in Alberta and is considered a *feme sole* for all purposes.[33] Moreover, neither party can be held liable for the other's contracts, wrongful acts or omissions or costs incurred in any action.[34]

d) Suggestions

It seems reasonable to suggest that the grounds for judicial separation in Alberta be brought into line with those for divorce by introducing as additional grounds those circumstances provided for under section 4(1) of the Canadian Divorce Act. In addition to England, this step has now been taken by British Columbia which has legislated that the grounds for judicial separation be the same as for divorce.[35]

4. PRESUMPTION OF DEATH AND DISSOLUTION

a) In England

The English Matrimonial Causes Act also contains provisions concerning a decree of presumption of death and dissolution. If a married woman has reasonable grounds to believe that her husband is dead she may present a petition to the court to have it presumed that he is dead and to have the marriage dissolved. If the court believes reasonable grounds to exist, it may grant a decree of presumption of death and dissolution of the marriage.[36]

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[33] *Id*. s.11(b).

[34] *Id*. s.13.

[35] Family Relations Act (1972) c.20 s.10.

Such a petition may be presented by a wife if she is domiciled in England or resident in England and has been ordinarily resident for three years immediately preceding commencement of proceedings.

It is further provided that if, for a period of seven years or more, the husband has been continually absent and the wife has no reason to believe that he has been living during that time, the husband is deemed to have died unless the contrary can be proved.[37] It appears however that the court's power is permissive and will not be exercised if there is some probability that the husband is still alive.[38] Again, the petitioner is not bound to rely on the seven year period of absence; the occurrence of some event such as a plane crash with no survivors would constitute sufficient evidence.

The Matrimonial Causes Act of 1973 now provides that neither collusion nor other conduct of the petitioner which may have been a bar to other matrimonial proceedings will constitute a bar to a petititon for presumption of death.[39]

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[36] Matrimonial Causes Act 1973 c.18 s.19.

[37] In Parkinson v. Parkinson (1939) 3 All E.R. 108 it was held that the fact that the spouses had parted under a separation agreement was no bar to the proceedings.

[38] Thompson v. Thompson (1956) 1 All E.R. 603, 608.

[39] Matrimonial Causes Act s.19(6).

b) In Canada

As has been seen, in England a decree of presumption of death and dissolution of marriage may be obtained where the court is satisfied that reasonable grounds for presuming death exist. This situation does not obtain in Canada where there is no such empowering statute. Thus the common law position is still in force in Canada, that a spouse will only be presumed dead where those who would normally have heard of him have not done so for seven years.[40]

Alberta, British Columbia and Manitoba in their respective Marriage Acts[41] provide for remarriage where the applicant's spouse has been neither seen or heard of for over seven years but this is a different thing from declaring the absent spouse presumed dead so that if the absent spouse were to reappear the subsequent marriage would be invalid.[42] The way to circumvent such an unfortunate situation would be by invoking s.4(1)(c) of the Divorce Act and seeking a divorce when a spouse has been absent for not less than three years and, despite efforts to locate him, no knowledge or information as to his whereabouts can be obtained.

5. DIVORCE

a) Jurisdiction

Domicile and residence being the grounds of jurisdiction in England,

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40. Power, The Law of Divorce in Canada 254 (1948).

41. The Marriage Act R.S.A. (1970) c.226; Marriage Act Amendment Act S.B.C. (1944) c.24; The Marriage Act R.S.M. (1940) c.126.

42. In Re Solemnization of Marriage Act, Tomberg v. Tomberg (Gilbert) (1942) 3 D.L.R. 687.

a married woman may petition for divorce if she is either domiciled in England when proceedings are begun or was habitually resident throughout one year immediately prior thereto.[43] It will be remembered that a married woman no longer must acquire her husband's domicile on marriage in England.[44]

In Canada, the Divorce Act provides that the court for any province has jurisdiction where the petitioner is domiciled in Canada and either petitioner or respondent has been ordinarily resident in the province for at least one year immediately preceding the filing of the petition and has actually resided in the province for at least ten months of that period.[45] For purposes of such a petition, a married woman is deemed to have her own domicile[46] and it is clear that national rather than provincial domicile is the basis of jurisdiction.[47]

The residence qualification has proved to be rather ambiguous.[48] It has been held that the phrase "ordinarily resident" does not preclude an absence from the jurisdiction either on business or pleasure[49] but the length of time out of the jurisdiction is an important factor.[50] The provision for actual residence for ten months of the one year period immediately preceding the petition has been held not to mean the ten months of actual residence which fell immediately before the filing of the petition; any time within the ordinary period of residence will suffice.[51]

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[43] Domicile and Matrimonial Proceedings Act (1973) c.45 s.5(2).

[44] Id. s.1.

[45] Divorce Act R.S.C. (1970) c.D-8 s.5(1).

[46] Id. s.6(1).

[47] On the broad question of jurisdiction see Mendes Da Costa, Divorce and the Conflict of Laws in 2 Studies in Family Law 899 (1972).

[48] Concerning the meaning of "residence" see Nowlan v. Nowlan (1971) 2 R.F.L. 67.

[49] Stransky v. Stransky (1954) P.428.

Thus in Wood v. Wood, the case of a member of the R.C.M.P. in Manitoba who was sent out of the Province for six months and petitioned for divorce less than 10 months after his return, it was held that as long as the petitioner had actually resided in the province for 10 months out of the whole period during which he was ordinarily resident in the province, he need not have actually resided there for the 10 months immediately preceding the filing of the petition. But the following year in Ontario in Hardy v. Hardy, the petition of a soldier who was sent out of the province in which he was ordinarily resident for part of the year immediately preceding his petition, was denied on the ground that the period of 10 months actual residence must take place within the year immediately preceding the petition - even if the 10 months was the total of several smaller periods within the year.

It is submitted that the decision in Hardy v. Hardy is unduly restrictive and that the Act should be more liberally construed in order to be in keeping with the general tenor of this enabling statute, therefore the decision in Wood should be followed. In Marsellus v. Marsellus it was held not necessary that the 10 months of actual residence fall immediately before filing a petition and that any time within the period of ordinary residence would suffice.

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[50] Lotoski v. Lotoski (1970) 2 R.F.L. 64.

[51] Marsellus v. Marsellus (1970) 13 D.L.R. (3d) 383; Wood v. Wood (1968) 2 D.L.R. (3d) 527. But see Hardy v. Hardy (1969) 2 O.R. 875.

b) The Grounds for Divorce in England

A petition for divorce may be presented in England by either party on the ground that the marriage has broken down irretrievably.[52] The marriage will be deemed to have broken down irretrievably where the petitioner finds it intolerably to live with a spouse who has committed adultery; where the other spouse has behaved in such a way that the petitioner cannot reasonably be expected to live with him or her; where the petitioner has been deserted for a continuous period of at least two years immediately preceding the filing of the petition; where the parties have lived apart for such a period and the respondent consents to the granting of a decree; and where the parties have lived apart for the preceding five years whether or not there is consent to the granting of a decree.[53]

It is provided that no petition for divorce shall be presented before the expiry of three years from the date of the marriage.[54] But an exception will be made where the petitioner can show he has suffered exceptional hardship or that the respondent has behaved with exceptional depravity, always providing that the interests of any child of the family are not prejudiced and there is no reasonable probability of reconciliation.[55] Where the court hears such an exceptional petition and concludes that there was misrepresentation or concealment of the nature of the case, it may dismiss the petition or grant a decree which shall not be made absolute for a specified period.[56]

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[52] Matrimonial Causes Act.(1973) c.18 s.1(1).

[53] Id. s.1(2). See also Bromley, "Living Apart" in the Law of Divorce (1972) 88 L.Q.R. 328.

[54] Matrimonial Causes Act (1973) c.18 s.3(1).

[55] Id. s.3(2).

The Act provides certain guidelines for the court when seeking to determine whether valid grounds exist for divorce. With regard to marriage breakdown resulting from the adultery of a spouse, a petition may not be based on this ground if the parties lived together for periods exceeding six months after the petitioner learned of the adultery.[57] But where one party learns of the other's adultery and they continue to live with one another for a lesser period, in any petition grounded on adultery such period of cohabitation is to be disregarded in determining whether the petitioner finds it intolerable to live with the respondent.[58]

Furthermore, in any petition for divorce where the petitioner alleges that he cannot reasonably be expected to live with the respondent, if the parties cohabited for less than an aggregate period of six months after the final incident complained of, such period of cohabitation is to be ignored in determining whether the petitioner cannot reasonably be expected to live with the respondent.[59]

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[56] Id. s.3(3).

[57] Id. s.2(1).

[58] Id. s.2(2).

[59] Id. s.2(3).

On the matter of desertion it is provided that the period of desertion is continued even when the deserter is no longer capable of having the animus deserandi providing the court can infer the probability of a continued desertion had the deserter remained capable of having such intent.[60] In deciding whether there has been a continuous period of desertion (or living apart) any aggregate period of resumed cohabitation which does not exceed six months is to be disregarded but such period(s) can not then be included in the period of desertion (or living apart).[61]

The Act specifies that for the purposes of a divorce petition the term "living apart" means living other than with each other in the same household.[62] Moreover, when a petition is based on living apart for two years, rules of court will ensure that the required consent of the respondent is based on proper information and knowledge of the consequences[63] of such a petition.

c) Bars to Divorce in England

Prior judicial separation is no bar to a petition for divorce and the facts used in the former case may be again used in the latter. The court may treat the prior decree as sufficient proof of the allegations in the divorce petition but the petitioner must give evidence again at the hearing of the divorce petition.[64] In such a case, or after an order ex-

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60. Id. s.2(4).
61. Id. s.2(5).
62. Id. s.2(6).
63. Id. s.2(7).
64. Id. ss.4(1)(2).

empting the parties from the duty to cohabit, for the purposes of the divorce petition a period of desertion immediately prior to filing the petition for judicial separation, or such an order, shall be deemed to immediately precede the petition for divorce, providing the parties have not resumed cohabitation since the decree or order.[65]

The one specific bar to a divorce petition is with regard to the ground of living apart for five years. The Act provides that where dissolution of the marriage would result in grave financial or other hardship to the respondent so that in all the circumstances it would be wrong to dissolve the marriage, the court shall dismiss the petition.[66] Where the respondent opposes the petition on this ground, if the court considers that the five years separation is the only issue and but for the respondent's opposition a decree would be granted, the court must then consider the conduct and interests of the parties and of any children or other interested party.[67] It is specifically provided that "hardship" in this context shall include the loss of any benefit which would not be lost if the marriage were not dissolved.[68]

While the Act is silent as to the traditional bars of collusion or connivance, provision is made for intervention by the Queen's Proctor who

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65. Id. s.4(3).

66. Id. s.5.

67. Id. s.5(2).

68. Id. s.5(3).

may, as a result of information laid with him, show cause why a decree nisi should not be granted.

d) The Grounds for Divorce in Canada

The Canadian Divorce Act, which came into force on July 2, 1968 represented an attempt to produce badly-needed comprehensive legislation on divorce, which would be applicable to all of Canada,[69] and to introduce the new element of non-fault divorce.[70] This Act made it clear that whereas it replaced all prior divorce legislation, it did not supersede existing legislation regarding matrimonial causes other than divorce.[71]

In Canada, a petition for divorce may be presented by either party, when the spouses are living separate and apart, on the ground that there has been a permanent breakdown of the marriage.[72] The marriage will be deemed to have permanently broken down where the respondent has been imprisoned for an aggregate period of three years in the five years preceding the petition, or two years when sentenced either to death or to at least ten years imprisonment and with no further right to appeal; where the respondent has been grossly addicted to alcohol or narcotics for at least three years immediately preceding the petition and there is no reasonable expectation of rehabilitation within a reasonably foreseeable period; where the petitioner has been unable to trace the respondent for at least three years immediately preceding the petition; where at least a year has elapsed and the marriage has not been consummated through the respondent's illness, disability or refusal; where the spouses have been living separate and apart for not less than three years for any reason other than the petitioner's desertion for five years; and where the petitioner has deserted the respondent for at least five years immediately preceding the petition.[73]

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[69] Statutory authority is the British North America Act (1867) 30 & 31 Vict. c.3 s.91(26) (as amended).

[70] Mendes da Costa, Divorce in 1 Studies in Family Law 359 (1972).

[71] Divorce Act R.S.C. (1970) c.D-8 s.23(2).

[72] *Id.* s.4(1).

Traditional grounds for divorce are also still specified in Canadian legislation. Thus divorce may be sought on the ground that the respondent has commited adultery; has been guilty of sodomy, bestiality, rape or homosexual acts; has committed bigamy; or has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.[74]

On comparing the grounds for divorce in both countries it can be seen that both have adopted the concept of the "no-fault" divorce but whereas in England a divorce may be obtained after the parties have lived apart for only two years if both consent to a decree, in Canada the minimum period is three years but this may be regardless of consent, unless the petitioner had deserted the respondent for five years. In both jurisdictions, however, after a period of five years of living apart either spouse may seek a decree of divorce regardless of who left whom.

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[73] Id.

[74] Id. s.3.

It is now proposed to look more closely at some of the points of difficulty which have arisen in Canada concerning particular grounds for divorce.[75]

i) Adultery and Other Sexual Offences

Most of the modern cases on adultery are concerned with the standard of proof required and it may be said that the standard of proof is generally judged the same as in any other civil proceedings, that is, by a preponderance of probability.[76] Thus, circumstantial evidence showing intent together with opportunity will usually suffice:[77] suspicion is not enough.[78] It is to be noted that admission of adultery is also not enough,[79] unless there is a confession on oath,[80] so that corroberative evidence is required.[81] However, in accordance with the gravity of the situation a heavier burden of proof may be imposed; for example, where the bastardization of an infant is involved the adultery should be proved beyond reasonable doubt.[82]

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[75] See Khetarpal, supra n.1 at 185; Payne, The Divorce Act (Canada) 1968 (1969) 17 Chitty's L.J. 249; Reville, The Divorce Act Annotated (1973).

[76] Smith v. Smith (1952) 3 D.L.R. 449; Blyth v. Blyth (1966) 2 W.L.R. 364 (H.L.); Jablonowski v. Jablonowski (1972) 28 D.L.R. (3d) 440 (Ont.S.C.).

[77] Mossing v. Mossing (1973) 31 D.L.R. (3d) 770.

[78] Dion v. Dion (1973) 3 W.W.R. 202.

[79] Divorce Act R.S.C. (1970) c.D-8 s.9(1)(a).

[80] Veysey v. Veysey (1972) 16 D.L.R. (3d) 239.

[81] Handy v. Handy (1973) 40 D.L.R. (3d) 485.

[82] Loewen v. Loewen (1971) 2 R.F.L. 230 (B.C.S.C.).

Where a petition is based on adultery, the effect thereon of the petitioner's adultery is not yet clear. In Delaney v. Delaney[83] a petitioner's adultery was held not to be a discretionary bar while in Ellis v. Ellis[84] it was assumed that it was, on the basis that the petitioner's conduct was one of the criteria governing exercise of the court's discretion. But Kalesky v. Kalesky[85] indicates that if the court finds that the marriage has broken down irrevocably, the petitioner's adultery will not be considered a bar.[86]

Of interest is the fact that artificial insemination with the seed of a donor without the husband's consent is not held to amount to adultery in England.[87] But it has been held in Canada that such artificial insemination _is_ adultery on the ground that the essence of adultery is not the moral turpitude but the surrender of the reproductive powers and is thus an invasion of the marital rights of husband and wife.[88]

It will be noted that since the Canadian Divorce Act either husband or wife may petition on any of the sexual offences.[89] It is clear in Canada that a husband may not be guilty of rape of his wife,[90] and whether the reverse is possible is not known. It has been held in England that a husband may be guilty of rape on his wife where a separation order is in force[91] and that in cases of sodomy, bestiality, rape or homosexual acts the respondent need not have been charged and found guilty in criminal proceedings.[92] With regard to homosexual acts, they would seem to include acts of lesbianism.[93]

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[83] (1968) 1 D.L.R. (3d) 303 (B.C.S.C.).

[84] (1968) 2 O.R. 843 (C.A.).

[85] (1973) 38 D.L.R. (3d) 181 (Ont.H.C.).

[86] Likewise with regard to the petitioner's delay in filing a petition, Handy v. Handy supra n.81.

[87] Maclennan v. Maclennan (1958) S.L.T. 12 (Court of Session, Outer House).

[88] Orford v. Orford (1921) 58 D.L.R. (Ont.S.C.).

ii) Cruelty

As has been seen early in this section, the term "cruelty" has happily been removed from English divorce legislation but it has been retained in Canada, together with the multitude of interpretations and arguments arising therefrom. The Canadian Divorce Act qualifies the term by providing that the cruelty must be of such a kind as to render intolerable the continued cohabitation of the spouses.[94]

The difficulty with which the Canadian courts were confronted after the Divorce Act was whether to follow the old common law view of cruelty as enunciated in Russell v. Russell,[95] that there must be conduct causing danger to life, limb or health, bodily or mentally, or reasonable apprehension thereof, causing further cohabitation intolerable, or whether to follow the wider interpretation in the leading case of Zalesky v. Zalesky[96] In the Zalesky case it was held that there was no need to consider whether the respondent's conduct had met the criteria enunciated in Russell v. Russell and that by the "intolerable" clause of the Divorce Act Parliament had intended to redefine the conduct required to constitute cruelty. Khetarpal contends that by now the decision in Zalesky has met with the approval of every province in Canada[97] so that the required elements for divorce on this ground are misconduct of a grave and weighty nature amounting to cruelty, with intolerability of continued cohabitation as a key factor. It may also be noted here that intent to injure is not now a prerequisite to cruelty.[98]

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[89] Divorce Act R.S.C. (1970) c.D-8 s.3.

[90] Criminal Code R.S.C. (1970) c.34 s.143.

[91] R. v. Clarke (1949) 2 All E.R. 448.

[92] T. v. T. (1970) 10 D.L.R. (3d) 125; G. v. G. (1970) 16 D.L.R. (3d) 107.

[93] M. v. M. (1972) 24 D.L.R. (3d) 114.

[94] S.3(d).

[95] (1897) A.C.395.

In attempting to ascertain whether the respondent's conduct amounts to cruelty as just defined, the crucial question arises as to whether the "grave and weighty nature" of the acts complained of and the "intolerability" should be assessed subjectively. From the decided cases so far it looks as if the courts try to arrive at a happy mean between the two approaches.

An attempt to lay down guidelines for determining cruelty was made in Lacey v. Lacey, Winney v. Winney and Weiss v. Weiss[99] from which one can discern an attempt to deal with the objective versus the subjective issue. It was there held that each case should be determined on its own merits the question being, "Is the conduct of this spouse to that other spouse cruelty?" While this question indicates a subjective approach, the need for a certain degree of objectivity was apparent in other guidelines which required that for acts to be grave and weighty they must in fact be insufferable and unendurable; that the acts complained of must be more than illustrative of marriage breakdown or incompatibility of the parties; that the ground of cruelty must not be used as an avenue to quick divorce in cases where proof of some of the other grounds was insufficient, because proof and corroboration must be required and subjective evidence of hurt feelings would not suffice.

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[96] (1968) 1 D.L.R. (3d) 471.

[97] Supra n.1 at 188.

[98] Hattie v. Hattie (1971) 3 R.F.L. 324.

[99] (1970) 1 O.R. 279.

Subsequently in Austin v. Austin[100] and Durant v. Durant[101] it was ruled that the actual nature of the respondent's conduct was not as important as the effect of his acts on the petitioner. But this subjective view has been tempered by other Canadian cases where a stand has been taken against broadening too far the ground of cruelty for divorce and where the conduct complained of appears to have been measured objectively.[102] It therefore appears that while the conduct complained of will be considered in the light of the personalities of the individual parties, whether the conduct would also be considered as grave and weighty and intolerable from a general point of view will also be of considerable importance.

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100. (1971) 13 D.L.R. (3d) 498.

101. (1971) 22 D.L.R. (3d) 488.

102. Anderson v. Anderson (1972) 29 D.L.R. (3d) 587; Baker v. Baker (1972) 5 R.F.L. 358; Marks v. Marks (1971) 3 R.F.L. 339.

Examples of the kinds of conduct found to constitute cruelty are repeated acts of physical violence;[103] mental cruelty;[104] alcoholism[105] and sexual incompatibility,[106] and various combinations of these.[107]

iii) Permanent Breakdown of Marriage

As has been seen, additional grounds may be presented on a petition for divorce providing husband and wife are living separate and apart and it can be claimed that as a result of these grounds there has been a permanent breakdown of the marriage. The most controversial of these grounds provides for divorce where, immediately preceding the petition, the parties have been living separate and apart for not less than three years for any reason other than the petitioner's desertion for five years, or where the petitioner has deserted the respondent for not less than five years.[108]

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[103] Feldman v. Feldman (1970) 14 D.L.R. (3d) 222; Horne v. Horne (1972) 5 R.F.L. 394; Vogt v. Vogt (1970) 3 N.S. (2d) 225.

[104] Burton v. Burton (1972) 8 R.F.L. 272, where the wife's constant ridiculing markedly affected the husband's health; Ells v. Ells (1970) 2 R.F.L. 186, where the wife's denigration and belittling of her husband's work affected his health; Farden v. Farden (1972) 3 R.F.L. 315 aff'd. 8 R.F.L. 183 where the husband's excessive fault-finding undermined the wife's confidence and her health; Cridge v. Cridge (1973) 12 R.F.L. 348 where held that mere incompatibility will not suffice.

[105] Savelieff v. Savelieff (1973) 35 D.L.R. (3d) 364 where addiction to alcohol held not sufficient to bring within this specific ground for divorce but was sufficient to constitute cruelty.

[106] Hock v. Hock (1971) 4 W.W.R. 262, where the wife's excessive sexual demands precipitated psychosomatic illness in the husband; but see Slon v. Slon (1969) 2 W.L.R. 375 where held that where there was refusal of sexual intercourse proof of injury to health was not required, and Ebenal v. Ebenal (1971) 20 D.L.R. (3d) 545 where refusal of sexual intercourse was not held sufficient for cruelty in the absence of other complaints.

[107] For a more comprehensive list of cruelty cases see Khetarpal, supra n.1 at 191; Reville, supra n.75 at 23.

The phrase "separate and apart" lends itself to various interpretations but it appears to be established that the words "separate" and "apart" are to be construed disjunctively; that there must be a withdrawal from the matrimonial obligation with intent to destroy the matrimonial consortium; that an animus separandi plus a factum of separation are essential so that the parties may be physically separate for a long time without being "separate and apart" within the meaning of the section. A look at some of the cases may serve to illustrate the meaning attributed to this section by the courts.

In Dorchester v. Dorchester[109] where a wife had been hospitalized for more than three years the husband filed a petition under section 4(1)(e)(i) concluding at that time that the matrimonial relationship had been destroyed. His petition was refused for while there had been a physical separation it was held that the consortium had not been destroyed for the required period. But in Kallweis v. Kallweis, where the petition was granted in another hospitalization case, it was held that the mental element of desertion was not required; that separation was a fact rather than a state of mind.[110] In contrast, the earlier case of Kennedy v. Kennedy[111] had held that not only was the state of mind an essential factor but that both parties must have intended to end the matrimonial consortium before a petition could be brought under section 4(1)(e)(i). Happily this view was not followed by the Canadian courts[112] and in Lachman v. Lachman[113] it was held that this section was appropriate where only the petitioner had rejected the consortium provided the marriage had broken down as a result. In these hospitalization cases it is clear that where the petitioner continues to visit the respondent merely through compassion, the petition is not prejudiced thereby.[114]

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[108] Divorce Act R.S.C. (1970) c.D-8 s.4(1)(e).

[109] (1971) 19 D.L.R. (3d) 126.

[110] (1970) 12 D.L.R. (3d) 206. See also Brinnen v. Brinnen (1972) 28 D.L.R. (3d) 110 where held, in a hospitalization case, that the consortium had been destroyed by circumstances beyond the control of the parties.

[111] (1968) 2 D.L.R. (3d) 405.

Isolated acts of sexual intercourse during the period were held in Foote v. Foote[115] to mean that the parties were not living "separate and apart" within the meaning of this section but Khetarpal is of the view that an isolated act would not interrupt the separation period.[116] Furthermore, the cases show that the parties may still be living under one roof but if the matrimonial relationship has been destroyed they are deemed to be living "separate and apart" for the purpose of this section.[117]

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[112] See Khetarpal, supra n.1 at 205.

[113] (1970) 12 D.L.R. (3d) 221.

[114] Norman v. Norman (1973) 12 R.F.L. 252.

[115] (1971) 1 O.R. 338. See also Dimaggio v. Dimaggio (1971) 4 R.F.L. 3. For criticism of this hard view see Mendes da Costa, 1 Studies in Canadian Family Law at 491 and Eekelaar, Family Law (1972) A.S.C.L. 237 at 284.

[116] Supra n.1 at 203.

[117] Smith v. Smith (1970) 74 W.W.R. 462; Kobayashi v. Kobayashi (1972) 26 D.L.R. (3d) 119. Where the matrimonial relationship was not destroyed see Foote v. Foote (1971) 1 O.R. 338; Burt v. Burt (1972) 24 D.L.R. (3d) 497; Compton v. Compton (1970) 1 N.S.R. (2d) 827.

It would appear that where the petitioner has rejected the consortium, but for reasons other than an enforced separation such as hospitalization of the respondent, the petition must be brought under section 4(1)(e)(ii) which is the ground of the petitioner's desertion for not less than five years. This refers to desertion, not in the sense of matrimonial fault, but as evidence of marriage breakdown. A spouse has been held to be in constructive desertion for the purposes of section 4(1)(e)(ii) by reason of continued refusal of intercourse;[118] where the husband left after being ordered out because of financial irresponsibility[119] and where the wife left because of the husband's illtreatment.[120] In March v. March[121] the husband petitioned under the earlier section 4(1)(e)(i) but because he was living with another woman the appropriateness of this section was questioned. However, it was held that the petitioner living with another woman did not of itself preclude a petition under this section and, moreover, that while the petitioner must show he was not in desertion, he need not prove such on the part of the respondent.

e) Refusal of a Decree in Canada

i) Consent of the Parties

The Canadian Divorce Act provides that it shall be the duty of the court to refuse a decree which is based solely upon the consent, admissions or default of either one or both of the parties.[122]

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[118] McMaster v. McMaster (1968) 69 D.L.R. (2d) 404.

[119] Naumoff v. Naumoff (1971) 2 O.R. 676.

[120] Struk v. Struk (1970) 14 D.L.R. (3d) 630.

[121] (1971) 2 O.R. 278.

ii) Collusion

It is also provided that a decree shall be refused when the court is satisfied that there has been collusion in presenting or prosecuting the petition.[123] Collusion is defined in the Divorce Act[124] as any conspiracy to deceive the court in which the petitioner participates in order to influence the outcome of the petition.[125] But the collusion will not include any arrangements made between the parties for separation, financial support, division of property or custody or care of children of the marriage.[126]

A common example of collusion is where the parties agree that the respondent will commit adultery in order to provide grounds for divorce. But where the petitioner later learns of such a scheme, the petitioner cannot be held guilty of collusion if not a party thereto.[127] While an agreement by one spouse to institute divorce proceedings at the request of the other may not be a collusive agreement,[128] a petition will be collusive if a bargain is struck so that the petitioner does that which otherwise he or she would not do;[129] for example, an agreement that the petition will not be defended if the petitioner foregoes maintenance[130] or that the petitioner, if she brought an action, would thereafter receive increased maintenance.[131]

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[122] Divorce Act R.S.C. (1970) c.D-8 s.9(1)(a).

[123] Id. s.9(1)(b). Collusion applies to petitions on any ground. See also Sopinka, The Divorce Act, 1968 Collusion Confined (1969) Can.Bar. Rev. 31.

[124] Divorce Act R.S.C. (1970) c.D-8 s.2(c).

[125] The definition in Noble v. Nobel and Ellis (No. 2) (1964) P. 250 still holds, that a collusive bargain is one with a corrupt intention.

[126] Tannis v. Tannis (1970) 8 D.L.R. (3d) 333.

[127] Milne v. Milne (1970) 1 O.R. 381.

The wording of the Act places a duty on the court to satisfy itself that there has been no collusion which has meant that the burden of proving the absence of collusion lay with the petitioner. The Ontario Court of Appeal however has interpreted this section to mean that where the petitioner leads no evidence on this point the court must satisfy itself as to the absence of collusion and make an affirmative finding that there was such collusion if it wishes to refuse a decree on this ground.[132]

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128. Prockiw v. Prockiw (1948) 4 D.L.R. 140. But see Campbell v. Campbell (1969) 2 D.L.R. (3d) 708 where although an agreement as to division of property was held not to be collusive, the court refused to approve it because it contained a covenant by one party to commence divorce proceedings.

129. See Sopinka, supra n 123 at 37 for the view that the taint of collusion should now be removed from such agreements in view of the new concept of marriage breakdown and the decreasing importance attached to the matrimonial offence.

130. Hodgins v. Hodgins (1942) O.R. 243.

131. Scott v. Scott and Pfeil (1946) O.R. 832.

132. Schuett v. Schuett (1970) 3 O.R. 206.

iii) Condonation and Connivance

The Divorce Act further provides that it will be the duty of the court to dismiss a petition under section 3 of the Act[133] unless satisfied that there was no condonation or connivance on the part of the petitioner, and unless the court was of the opinion that the public interest would be better served by granting the decree.[134] Any conduct that has been condoned now can not be revived so as to constitute a ground for divorce under section 3[135] and the Act expressly provides that, for the purpose of determining condonation, any resumption of cohabitation during any single period of 90 days with reconciliation as its primary purpose shall be excluded.[136]

Since the Divorce Act does not give a definition of condonation, the common law interpretation of the term is still relevant. The three basic elements in condonation are deemed to be knowledge of the offence, forgiveness of the offence, and a reinstatement of the offending spouse to his or her former position. Forgiveness need not be in the ecclesiastical sense but sufficient to enable reconciliation to take place.[137]

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[133] Adultery, sodomy, bestiality, rape or homosexual act; bigamy or cruelty.

[134] Divorce Act R.S.C. (1970) c.D-8 s.9(1)(c).

[135] Id. s.9(2).

[136] Id. s.2(d). But this does not mean that cohabitation in excess of 90 days is therefore condonation, Einarson v. Einarson (1970) 20 D.L.R. (3d) 126.

[137] Nielsen v. Nielsen et al. (1971) 1 O.R. 393.

The reconciliation must be full and mutual[138] and there must be full knowledge of all the facts at the time of forgiveness.[139]

As to whether sexual intercourse subsequent to the matrimonial offence will constitute condonation it has been held that it will not of itself constitute condonation.[140] Conversely, there may be condonation where there is a resumption of the consortium but without intercourse.[141] The test is whether or not reconciliation had taken place; intercourse after reconciliation will be condonation but not so if there is no reconciliation.[142] It is to be noted that the provision precluding condonation where there is a resumption of cohabitation for a single period of ninety days is expressed to be primarily with a view to reconciliation so that intercourse during such cohabitation but before reconciliation is achieved is not condonation.[143] This is a difficult area because it would be normal for an optimistic spouse to say there had been unconditional forgiveness but after a period of resumed cohabitation it was discovered that this was not so.

With regard to the provision concerning resumption of cohabitation for any single period of 90 days there are two interpretations: firstly, that there may be several separate periods so long as each does not exceed 90 days[144] and secondly, that there can be only one period of attempted reconciliation so that several periods totalling less than 90 days would be outside the section and the second period would constitute condonation.[145] It is suggested that this latter view is unduly severe and thereby flies in the face of the general tenor of the Statute, one of the aims of which is to promote and assist reconciliation wherever possible. It is therefore recommended that the former view be followed.

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[138] Thus in Einarson v. Einarson, supra n.127 where there was resumed cohabitation for more than a year, the court did not find condonation.

[139] Herbert v. Herbert et al. (1936) 3 D.L.R. 141 (C.A.).

[140] Grandy v. Grandy (1972) 26 D.L.R. (3d) 359; MacDougall v. MacDougall (1970) 3 O.R. 680.

[141] Tingey v. Tingey et al. (1970) 3 O.R. 179; Robinson v. Robinson (1968) C.C.L. 20.

[142] Stevenson v. Stevenson (1970) 2 R.F.L. 89.

[143] Nielsen v. Nielsen (1971) 15 D.L.R. (3d) 423. This principle applies even if resumed cohabitation is after the decree nisi Brown v. Brown (1971) 15 D.L.R. (3d) 382.

The provision that the court may still grant a decree if in the public interest to do so, even where there is condonation, makes this bar a discretionary one. As to what is meant by "public interest" the Act is silent. However, the criteria laid down in Blunt v. Blunt[146] for determining what is in the public interest appear to be followed.[147] These criteria to be considered are: the position and interests of the children of the family; the interests of any third party with special regard to the prospect of marriage between the erring spouse and that third party; the prospect of reconciliation; the interests of the petitioner - especially if remarriage is desired, and finally, the interests of the community at large by attempting to balance the desirability of upholding the sanctity of marriage on the one hand and, on the other, the social consideration which makes it contrary to public policy to preserve a completely broken marriage.

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[144] Cherniski v. Cherniski (1971) 16 D.L.R. (3d) 606.

[145] Armstrong v. Armstrong (1971) 3 O.R. 544.

[146] (1943) A.C. 517.

[147] Payne, The Divorce Act (Canada) 1968 (1969) 8 Alta L. Rev. 1 at 26; Saxton v. Saxton (1973) 3 W.W.R. 219; Nielsen v. Nielsen supra n.143; Allan v. Allan (1971) 25 D.L.R. (3d) 253.

It will be noted that while the Divorce Act has expressly provided that conduct which has been condoned cannot be revived, the courts have so interpreted this provision as to enable the petitioner refer to condoned acts of cruelty in order to explain subsequent acts which, while not amounting to cruelty in themselves, have then been found to constitute cruelty when considered in the light of the previous condoned acts.[148]

The above remarks concerning condonation also apply to connivance. The essence of connivance is a corrupt intention on the part of the petitioner who must have expressly or impliedly consented or wilfully contributed to or helped promote the matrimonial offence.[149] Normally connivance precedes the offence but when an adulterous association is a continuing one, later acts cannot be severed from earlier ones and the petitioner, unless he or she can show no causal connection between the earlier and later acts, is deemed to have connived also at the earlier acts.[150] Furthermore, where a spouse has connived at the commencement of an adulterous association, connivance is presumed regarding later acts.[151]

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[148] Croft v. Croft (1969) 10 D.L.R. (3d) 267; Olson v. Olson and Lazich (1971) 3 W.W.R. 506; Jaworski v. Jaworski (1973) 34 D.L.R. (3d) 44.

[149] Maddock v. Maddock (1958) O.R. 810. In May v. May (1952) it was held that there will not be connivance where a spouse, having reasonable cause for suspecting adultery, watches the other spouse with a view to collecting evidence. Moreoever, a petitioner is not obliged to stop an act of adultery, Fleet v. Fleet (1972) 26 D.L.R. (3d) 134.

iv) Expectation of Resumed Cohabitation

In petitions where the ground is marriage breakdown under section 4 of the Divorce Act, it is provided that it is the duty of the court to refuse a decree where there is a reasonable expectation that the parties will resume cohabitation within a reasonably foreseeable period.[152] Both spouses must be willing otherwise this section may not be invoked.[153]

v) Family Interests Prejudiced

Again the court has a duty to refuse a decree under section 4 on the ground of marriage breakdown if it would have a prejudicial effect on the making of reasonable maintenance arrangements for children of the marriage.[154] This provision makes it incumbent on the court to take the initiative, if necessary, in considering the effect of a decree on a child.[155] The court must also refuse a decree based on marriage breakdown under section 4(1)(e)[156] where to grant the decree would be unduly harsh or unjust to either spouse or would prejudicially affect the making of reasonable maintenance arrangements.[157]

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[150] Gipps v. Gipps (1864) 11 E.R. 1230; Churchman v. Churchman (1945) P.44; Godfrey v. Godfrey (1965) A.C. 444.

[151] Yanoshewski v. Yanoshewski (1973) 40 D.L.R. (3d) 461.

[152] Divorce Act R.S.C. (1970) c.D-8 s.9(1)(d).

[153] Paskiewich v. Paskiewich (1968) 2 D.L.R. (3d) 622.

[154] Divorce Act R.S.C. (1970) c.D-8 s.9(1)(e).

[155] Davies v. Davies (1969) 3 D.L.R. (3d) 381; Wallace v. Wallace (1973) 2 W.W.R. 763.

As to what would be considered "unduly harsh and unjust", in Johnstone v. Johnstone[158] it was held that the standard should be a subjective one and that there must be hardship or injustice which went beyond normal consequences that is, the onus was on the respondent to show that there would be hardship and injustice which went beyond those consequences which would normally flow from the loss of married woman status. It may be noted that the loss of pension rights to a respondent wife is usually considered a normal consequence of divorce.[159] In Lachman v. Lachman[160] the Ontario Court of Appeal reversed an earlier decision which was to refuse a decree on this ground because the petitioner intended to remarry and he could not support two women. On appeal the decree was allowed on the ground that to rule otherwise meant that only the rich were entitled to a divorce where the support of a new wife and a former wife were involved.

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[156] Sec. 4(1)(e) provides for a petition on marriage breakdown where the spouses are living separate and apart for not less than 3 years for any reason other than the desertion of the petitioner for not less than 5 years.

[157] Divorce Act R.S.C. (1970) c.D-8 s.9(1)(f).

[158] (1969) 2 O.R. 765.

[159] Smith v. Smith (1971) 1 W.W.R. 409; See also Bigelow v. Bigelow (1972) 22 D.L.R. (3d) 729 where a decree was allowed and an elderly, sick wife lost pension rights but this was held not prejudicial because she could go on welfare. See also Savage v. Savage (1971) 16 D.L.R. (3d) 49 where a decree was granted on condition that the respondent receive half of the petitioner's army pension. But see Williston v. Williston where a decree was refused under this section because the innocent respondent wife would have lost War Veteran pension benefits and maintenance of a child would have been prejudiced, (1972) 30 D.L.R. (3d) 746.

[160] (1970) 3 O.R. 29.

f) Court's Duty to Attempt Reconciliation

i) In England

The Matrimonial Causes Act makes provision for the petitioner's solicitor to certify that he has discussed the possibility of reconciliation with the petitioner and advised him or her of the names and addresses of professional marriage counsellors.[161] Furthermore, if at any stage of the proceedings there appears to be a reasonable possibility of reconciliation, the court may adjourn for such period as it thinks fit with a view to aiding such a reconciliation.[162]

ii) In Canada

The Divorce Act imposes a duty on the legal advisers of the parties to a divorce action to draw the latter's attention to those sections of the Act which are aimed at assisting reconcilation;[163] to advise them of marriage counselling facilities and to discuss the possibility of reconciliation.[164] All petitions must be endorsed accordingly by the petitioner's legal adviser.[165] A duty is also imposed upon the court, prior to the hearing of the evidence, to ascertain from the parties what is the possibility of reconciliation. At any stage in the proceedings, if it appears possible that a reconciliation might be effected, the court must adjourn the proceedings for at least 14 days and may nominate a counsellor to assist the parties.[166] It is further provided that when the court nominates a person to assist reconciliation, such a person is neither competent nor compellable to disclose in court any communication made to him by the parties; evidence of anything which transpired between such nominee and the parties is not admissible in any legal proceedings.[167] In Robson v. Robson[168] the court addressed itself to the question of whether evidence arising from the efforts of any marriage counselling would be inadmissible under the Divorce Act or whether the Act merely prohibited evidence arising from the efforts of a counsellor nominated by the court for this purpose. The latter view was held to be the correct one. Again, in Cronkwright v. Cronkwright[169] the admissibility of a clergyman's evidence was at issue. The clergyman had not been appointed as a counsellor by the court under the Act but had been providing marriage counselling for the wife in his professional capacity. The clergyman's evidence was therefore admissible under the Act. The court ruled however that while clergymen and others enjoying confidence had a duty to preserve such confidence, this privilege would not prevail over the need for a fair and open administration of justice and the court must use its discretion as to the admissibility of such evidence.

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[161] (1973) c.18 s.6(1).

[162] Id. s.6(2).

[163] These sections are 2(d), 9(3)(b), 9(1)(c), 8(1), 21, 9(1)(d).

[164] R.S.C. (1970) c.D-8 s.7(1).

[165] Id. s.7(2).

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166. Id. s.8. It will be noted that adjournment in such a case is mandatory in Canada but discretionary in England.

167. Id. s.21.

168. (1969) 7 D.L.R. (3rd) 289.

169. (1970) 2 R.F.L. 241.

6. THE DECREES

In Canada it is provided that every decree of divorce shall be a decree nisi in the first instance and shall not be made absolute until three months after the granting of the decree providing all right of appeal from the decree has been exhausted.[170] The court, however, is empowered to grant the decree absolute after a shorter period if in the public interest to do so.[171]

Between the granting of the decree nisi and the decree absolute any person may show cause why the decree should not be made absolute by reason of collusion, reconciliation of the parties or other circumstance, whereupon the court may rescind the decree nisi, making further enquiries or such further order as the court thinks fit.[172]

In England a decree nisi shall not be made absolute until six months after the granting of the decree but the court is empowered to fix a shorter period.[173] After the decree nisi, the Queen's Proctor or any other person other than the parties to the suit may show cause why the decree should not be granted, in which case the court may make further enquiries, rescind the decree nisi, grant the decree absolute or make any other order it thinks fit.[174]

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170. Divorce Act R.S.C. (1970) c.D-8 s.13(1).

171. Id. s.13(2).

172. Id. s.13(3).

173. Matrimonial Causes Act (1973) c.18 s.1(5).

174. Id. s.9.

Special provisions are incorporated in the English Matrimonial Causes Act for the protection of the respondent after the decree nisi where dissolution is sought on the two or five year separation period. Where the consent of the respondent is required on a petition for divorce on the ground of two years separation, the court must be satisfied that the respondent was in no way mislead. Where the respondent in such cases has applied to have his financial situation considered, the court must consider all the circumstances including specifically the age, health, conduct, earning capacity, financial resources and obligations of each party and the respondent's financial position should the petitioner predecease him. The court must not thereafter make the decree absolute unless it is satisfied that the petitioner should not be required to provide for the respondent or that such provisions as have been made are the best that can be made in the circumstances. On the other hand the court may, notwithstanding the requirement to consider the above matters, make the decree absolute if it is convinced of the need for action without delay or the petitioner has given an undertaking to make financial arrangements such as the court may approve.[175]

7. LAW REFORM IN DIVORCE

The Law Reform Commission in Canada has recently produced a Working Paper on Divorce.[176] This Paper notes that the 20th Century has seen an international trend towards the adoption of marriage breakdown as the sole criterion for divorce;[177] it cites England, Australia, Denmark,

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[175] *Id*. s.10.

[176] *Working Paper 13 (1975)*.

[177] *Supra* at 10.

United States and Russia among those countries which have adopted this criterion. It points out that while proof of certain events is still required, there is growing support for the view that only the parties really know if the marriage has broken down and therefore lists of conditional events upon which a decree is dependent are superfluous.

The Law Commission claims considerable dissatisfaction to exist in Canada today with regard to its divorce legislation because it is too rigid and narrow in its outlook.[178] While it is said that Canada has no-fault divorce the Paper points out that there is still a considerable fault element to be found in the provisions of section 4 of the Divorce Act. Furthermore, apart from the undoubted ambiguity and uncertainty in many provisions, it blames subjective judicial interpretation for some of the unrealistic judgments which are made in that while minimal evidence may be required by one judge, another in similar circumstances will require the most meticulous evidence.

The Commissioners take issue with Canadian divorce procedures condemning them because they are adversary in nature and therefore highly inappropriate for family disputes.[179] They claim that preventive, therapeutic and investigative procedures are what are urgently required and that existing counselling and conciliation provisions are ineffective being superimposed on an adversary, fault-orientated divorce process.

The Law Reform Commission's Working Paper recommends more informal, flexible, investigative procedures and that where parties do not agree the case should automatically be adjourned to enable the court attempt a reconciliation.[180] The Report also recommends that any statutory period of separation as proof of marriage breakdown should be dispensed with as unnecessary and that where there are children of the marriage, their care and maintenance must be the prime factor in granting a decree.[181]

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[178] Supra at 14.

[179] Supra at 23.

It is recommended that Canada dispense with the traditional offences as such and that there be one ground for divorce which would be the permanent breakdown of the marriage. Then reasons for a petition such as adultery, cruelty and the sexual offences would become subject to the overriding provision of permanent breakdown of the marriage.

It is also suggested that in cases where the petitioner has been deserted by the respondent, three years is an unduly long period to wait for relief. It is recommended, therefore, that the three year "separate and apart" provision be reduced to two years where the respondent has deserted the petitioner.

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[180] Supra at 37.

[181] Supra at 34, 39.

CHAPTER EIGHT

THE MARRIED WOMAN'S RIGHT TO MATRIMONIAL RELIEF: FINANCIAL PROVISIONS

1. FINANCIAL RELIEF IN ENGLAND

At the root of all legislation concerning matrimonial financial relief is the concept of a primary duty within the family to be self-sustaining. As Margaret Puxon has declared: [1]

> It is a principle of English social law that no one shall be allowed to become a charge on the state while there is some member of his immediate family capable of maintaining him. In this respect the law intervenes decisively in the family: welfare state or no welfare state, a man or woman attracts on marriage the liability for the basic necessaries of life of husband, wife, and children, and he or she cannot contract out of this liability. No mutual agreement not to ask for maintenance can oust the right of the state to look to one spouse for the maintenance of the other.

a) Maintenance Pending Suit

Where matrimonial relief is being sought an order for maintenance pending suit may be ordered on filing a petition for divorce, nullity or judicial separation. Such an order will require either party to pay to the other such periodical payments for maintenance as the court thinks reasonable: such payments may not continue beyond the determination of the suit.[2] On an application for maintenance pending suit it has been customary to award a smaller sum than would be the case on other types of maintenance applications: about one fifth of the joint incomes would be considered normal.[3] The intent in such cases is to ensure that the applicant is provided with the essentials of life until such time as the court arrives at a permanent solution to the marital problem.

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[1] Puxon, The Family and the Law 173 (1967).

[2] Matrimonial Causes Act (1973) c.18 s.22.

b) Financial Provisions on Granting a Decree

On granting a decree of divorce, nullity or judicial separation, or at any time thereafter, the court may make any one or more of the following orders:

i) That either party shall make to the other, or shall secure to the other, periodical payments for the term specified[4] or shall pay such lump sum or sums as are specified.[5] But where such an order is made on or after a decree of divorce or nullity it shall not take effect until the decree is made absolute.[6]

ii) That one of the parties shall make to a specified person for the benefit of a child of the family, or to such a child, periodical payments [7] or such lump sum [8] as may be specified. This provision will not apply to children of 18 years or older unless they are undergoing training or further education or there are special circumstances making it desirable that the provision apply. [9] Furthermore this provision may apply before the decree is granted [10] and even if the proceedings are dismissed. [11]

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[3] Puxon, supra n. 1 at 176.

[4] Matrimonial Causes Act (1973) c.18 s.23(1)(2)(b).

[5] Id. s.23(1)(c).

[6] Id. s.23(5).

In the case of all lump sum payments, orders for such may be made in order to meet maintenance expenses of spouse or child incurred before the application for an order was made. [12] Lump sums may be ordered to be paid in installments and such payments may be required to be secured to the court's satisfaction. [13]

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[7] Id. ss.23(1)(d)(e).

[8] Id. s.23(1)(f).

[9] Id. ss.29(1)(3).

[10] Id. s.23(2)(a).

[11] Id. s.23(2)(b).

[12] Id. ss.23(3)(a)(b).

[13] Id. s.23(3)(c).

c) Property Adjustments on Granting a Decree

On granting a decree of divorce, nullity or judicial separation, or at any time thereafter, the court may make any one or more of the following orders:

i) That either party shall transfer to the other or to a child of the family or to another for the benefit of such child, such property as may be specified which belongs to the transferor either in possession or reversion.[14]

ii) That a settlement be made, or an existing settlement varied, of specified property of either party for the benefit of the other party or children of the family or either or any of them.[15]

As has been seen, section 25 of the Matrimonial Causes Act makes explicit the criteria to which the court must have regard in deciding how to exercise the powers just described.[16]

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[14] Id. s.24(1)(a).

[15] Id. ss.24(1)(b)(c)(d).

[16] Supra, Chapter Five.

d) Financial Relief Where Neglect to Maintain

Where a court would have jurisdiction to entertain proceedings for judicial separation it may entertain an application by either party to the marriage alleging wilful neglect to maintain. In the case of a wife petitioner she must show that the husband had wilfully neglected to provide reasonable maintenance either for herself or for any child of the family or to provide proper contribution in the latter case.[17] In the case of a husband petitioner he must show that the wife had wilfully neglected to provide or make proper contribution towards reasonable maintenance for any child of the family or for her husband in such cases where it would be reasonable for the wife to contribute in view of the husband's incapacity and the resources of both.[18]

On such application the court may make such one or more of the following orders as it thinks just:

i) An order that the respondent shall make periodical payments, or secure such to the satisfaction of the court, or pay a lump sum to the applicant.[19]

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[17] Matrimonial Causes Act (1973) c.18 s.27(1)(a).

[18] Id. s.27(1)(b).

[19] Id. ss.27(6)(a)(b)(c).

ii) An order that the respondent shall make to a specified person for the benefit of a particular child, or to that child, such periodical payments or shall secure such payments to the satisfaction of the court or shall pay such lump sum as may be specified.[20]

The Act seeks to forestall difficulties which may arise concerning "a child of the family". This section is said to apply only to those children concerning whose maintenance it is reasonable to expect the respondent to contribute or provide.[21] If the child is not the child of the respondent, the court, in determining whether there was wilful neglect to provide and what order should be made, must have regard to the extent and degree to which the respondent had hitherto accepted responsibility for the child, whether the respondent knew the child was not his or her own and what other person might be liable to maintain the child.[22] Provision is also made for interim child maintenance pending determination of the above issues.[23]

In the case of all the financial provisions above referred to, the court is empowered to vary or discharge any order or to suspend or subsequently revive any provision made therein.[24]

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[20] *Id.* ss.27(6)(d)(e)(f).

[21] *Id.* s.27(3).

[22] *Id.* s27(4).

[23] *Id.* s.27(5).

[24] *Id.* ss.31(1)(2).

The wife who has been neglected, deserted or ill-treated but who does not seek separation or dissolution may either approach the Magistrates' Court or the High Court seeking a maintenance order. Regardless of the avenue taken, the rule of thumb in general use is that a wife should receive such sum as will bring her income, if any, up to one-third of the total joint income of both husband and wife. On the other hand, where the husband's income is very large the test will be what sum is required to keep the wife in the manner to which she was accustomed.[25]

The above method of assessing maintenance is but a guide only. All the circumstances surrounding each application will be taken into account; for example, the conduct of the applicant and the ability of the applicant to find independent work.[26] It is to be noted that a party will not necessarily escape liability by showing that there is insufficient income because the court order is based upon the ability of the defendant to pay.[27]

Separation orders in the Magistrates' Court are at times preferred to divorce actions chiefly because of the ease of enforcing maintenance orders. Maintenance monies are collected by the clerk of the court who may cause an erring spouse to come before the court as a result of which the spouse may be imprisoned or have his earnings attached. Attachment of earnings is a very convenient device which can be employed as soon as payments are one month in arrears. The court denotes in its order the amount to be paid by the employer into court from the spouse's earnings each week or month and also the amount below which the earnings must not be reduced. Where the erring spouse flees the country to escape from maintenance payments the chances are that he will not succeed because of the reciprocal arrangements between England and many other countries. [28]

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[25] Puxon, supra n. 1 at 175.

[26] Donaldson v. Donaldson (1958) 2 All E.R. 660.

[27] But where the wife has never worked during marriage, the court will not expect her to go out and find work in order to lower the husband's liability for maintenance; see Rose v. Rose (1951) P. 29.

2. FINANCIAL RELIEF IN CANADA

a) Statutory Authority and Jurisdiction

While the common law has always provided that the husband should provide for the wife the necessities of life, statutory protection has been limited. The Criminal Code has declared the husband's duty in this regard [29] as has the Alberta Maintenance Act, [30] which latter Act as early as 1955 made reciprocal provision for support of the husband by the wife.

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[28] Puxon, supra, n.1 at 181,184,185.

[29] R.S.C. (1970) c.C-34 s.197.

[30] R.S.A. (1970) c.222 s.4.

The authority for granting matrimonial financial relief in Canada flows from two main sources.[31] Firstly, the federal Divorce Act, sections 10, 11 and 12: secondly, the provincial statutes.[32] It will be noted that during the subsistence of the marriage financial relief is generally known as "alimony" but upon dissolution of the marriage it is termed "maintenance".

Some confusion exists as to which Act applies in specific cases and so, having regard to Alberta, it may be said

a) that the Divorce Act provides for support during divorce proceedings and also after the divorce is granted providing the divorce court has addressed itself to the question of maintenance at the decree nisi stage and

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[31] See generally Khetarpal, *Alimony and Maintenance in Domestic Relations Case Book* (1975); Payne, *The Divorce Act (Canada) 1968* (1969); *Institute of Law Research and Reform: Matrimonial Support: Working Paper* (1974).

[32] Domestic Relations Act R.S.A. (1970) c.113 as amended;
Divorce and Matrimonial Causes Act R.S.B.C. (1948) c.97 as amended;
The Queen's Bench Act R.S.M. (1954) c.52 as amended;
The Queen's Bench Act R.S.S. (1960) c.35 as amended;
The Divorce Court Act R.S.N.B. (1952) c.63 as amended;
The Matrimonial Causes Act R.S.O. (1960) c.232 as amended;

Of The Court of Marriage and Divorce R.S.N.S. (1954) Vol. IV at 31;
An Act to Amend the Laws Relating to Divorce and Matrimonial Causes R.S.N.S. (1954) Vol. IV at 32-35;
Alimony Act R.S.N.S. (1954) c.7;
An Act for Establishing a Court of Divorce in this Island and For Repealing a Certain Act Therein Mentioned (1835) 5 Will. IV c.10 as amended.

In *Zacks* v. *Zacks* (1973) 35 D.L.R. (3rd) 420 at 429 the Canadian Supreme Court held that alimony and maintenance, being matters concerning property and civil rights, came within the exclusive jurisdiction of the provincial legislatures - unless they were ancillary to the main issue of divorce.

b) that the Alberta Domestic Relations Act provides for support during marriage until a petition for divorce is filed and after the dismissal of a divorce action or a declaration of nullity. It is unclear which Act applies in the event that divorce is granted but maintenance refused or not considered at decree nisi.[33]

c) In Alberta jurisdiction is divided between the Trial Division of the Supreme Court and the Family Court. The Family Court acts in applications for Protection Orders under Part 4 of the Domestic Relations Act and, in addition, orders which have been made in the Supreme Court may be filed and enforced by the Family Court.

b) Interim Orders

While the basis of alimony orders is the husband's duty to support the wife, this does not mean that the court is bound to issue such orders, the court having discretion in the matter.[34] When the court does decide to make an order for alimony pending suit it is usually on the basis of one-fifth of the joint incomes.[35] But this rule of thumb

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33. Institute of Law Research and Reform, supra n.31 at 10.

34. Waller v. Waller (1956) P.300.

35. Hawkes v. Hawkes (1928) 1 Hogg. Ecc. 526.

is but a guide, [36] the court having regard to all the circumstances of the case. It will be noted that where the wife has committed adultery she will not necessarily be refused alimony. [37] In the event that the parties have agreed on alimony payments the courts will be slow to interfere with the arrangement. [38]

The Divorce Act provides that the court in which is filed the petition for divorce may make such order pending the hearing and determination of the petition, as it thinks fit and just for the payment of alimony or an alimentary pension; such payment would be by either spouse to the other as the court thought reasonable having regard to the means and needs of each of them. [39] The court may also make such orders for the maintenance, custody, care and upbringing of children of the marriage. [40]

Normally, interim alimony or maintenance should commence on the date the writ was issued rather than the date when the parties separated [41]

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36. Eaton v. Eaton (1870) L.R. 2C. & D.51.

37. Waller v. Waller supra n.34.

38. Powell v. Powell (1876) L.R. 3 P.&D.186.

39. Divorce Act R.S.C. (1970) c.D-8 s.10(a).

40. Id. s.10(b).

41. Papp v. Papp et al (1970) 1 O.R. 331. But see Steinhuebl v. Steinhuebl (1970) 2 O.R. 683 where, because of delay between solicitors, maintenance was dated back to the date of demand.

and an order for interim maintenance will only be effective up to the decree nisi.[42] Upon the hearing of a petition for interim alimony the merits of the case will not be gone into[43] providing it is neither frivolous nor vexatious. But in the case of an application for child maintenance some consideration of the circumstances is necessary for it has been held that the court must endeavour to provide for the child a standard of living comparable to that which would have been enjoyed had the marriage not broken down; furthermore this goal takes precedence over the right of either parent to maintain the former standard of living.[44]

While the Act does not make specific provision for varying interim orders, it has been held that the Master or Local Master of the court may vary an order for interim alimony which he had previously made[45] but there must be a substantial change in circumstances and, generally speaking, such applications do not appear to be encouraged.[46]

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42. Favor v. Favor (1971) 5 W.W.R. 573.
43. I.H. v. H.H. (1971) 3 O.R. 222.
44. Paras v. Paras (1971) 1 O.R. 130.
45. Carvell v. Carvell (1969) 2 O.R. 513.
46. Lipson v. Lipson (1972) 2 O.R. 401.

In Alberta, the Domestic Relations Act provides that on an application in an action for alimony, dissolution of marriage, declaration of nullity, judicial separation or restitution of conjugal rights an order for interim alimony may be made to either husband or wife in an amount fixed at the discretion of the court.[47] However, no order can be made where the applicant has independent resources which are sufficient.

c) Corollary Relief

In sections 10 and 11 of the Divorce Act are found the provisions for financial relief in connection with dissolution of marriage. The innovative feature of these provisions is that statutory recognition is now given to the mutual rights and obligations of support between the spouses. A wife can now be ordered to provide support for her husband: However, since the wife, because of her role as mother and homemaker, is usually financially dependent on her husband, not many cases arise where the husband claims maintenance from the wife: such cases would usually be where the husband was mentally or physically impaired and therefore unable to hold gainful employment. In the case of Cohen v. Cohen[48] it was held that corollary relief was not restricted to the wife petitioner and could therefore be granted to the husband even although he had not cross-petitioned for divorce. In this case the husband, while successful in business, had transferred some of his real property assets to his wife because of her demands for financial security. Upon the failure of the husband's business and of his subsequent business ventures, the husband was injured in an auto accident and ended up on welfare. In the divorce proceedings eventually brought by the wife the court held that it would be fit and just to require the wife to pay periodic sums of $335 per month to the husband for his maintenance.

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[47] R.S.A. (1970) c. 113 s.17 (1)(3).

[48] (1970) 1 R.F.L. 275.

As to the specific provisions of the Divorce Act, section 11 provides that upon granting a decree nisi of divorce, if the court thinks it fit and just to do so having regard to the conduct and the condition, means and other circumstances of each party, the court may make one or more of the following orders:

a) an order requiring either party to secure or pay such lump sum or periodic sums as the court thinks reasonable for maintenance of the other spouse, the children of the marriage, or both or all of them; [49]

b) an order providing for the custody, care and upbringing of the children of the marriage. [50]

The Act further provides that these orders may be varied from time to time or rescinded if the court which made the order thinks it fit and just to do so after considering the parties' conduct since the order was made and any change in the condition, means or other circumstances of either of them.[51] It may be noted here that section 12 of the Act, which enables the court to impose such terms, conditions or restrictions as it thinks fit and just in these matters, has been used to enable the court insert dum sola et castra clauses but such should not be used with regard to an innocent wife or where the allowance made is minimal.[52]

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[49] Divorce Act R.S.C. (1970) c.D-8 ss.11(1)(a)(b).

[50] Id. s.11(1)(e).

Some controversy has ensued as to precisely when these orders may be made, the wording of the section, "upon granting a decree nisi of divorce", being ambiguous. It seems clear, however, that such orders cannot be made if the petition is dismissed[53] nor can they be made on application at a later date.[54] Moreover, only an order made at decree nisi may be varied; no original order may be made under the provision for varying an order.[55] Thus if maintenance does not appear to be required at the time of decree nisi, a nominal order should nevertheless be applied for in order to keep the right alive so that in case of future need an application may be made to vary the order.[56] It will be noted that where an order is made under an induced mistaken belief as to the facts, a substitute order, such as would otherwise have been made at the time of decree nisi may be made at a later date.[57] It has also been held by the Supreme Court of Canada that it is not necessary, where maintenance is found justified, to fix the precise amount at decree nisi; it may be fixed later after receiving advice.[58]

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[51] Id. s.11(2).

[52] On use of the dum sola et castra clause today see MacDougall, infra n.104 at 337.

[53] Galbraith v. Galbraith (1969) 8 D.L.R. (3d) 24; Cherewick v. Cherewick (1969) 69 W.W.R. 235.

[54] Daudrich v. Daudrich (1971) 14 D.L.R. (3d) 245.

[55] Id.

[56] At decree nisi the court cannot make an order to take effect on some indefinite future date, Todd v. Todd (1969) 5 D.L.R. (3d) 92.

As to what the court may consider "fit and just" in these matters, this is to be determined by the conduct of the parties and their condition, means and other circumstances: Misconduct on the part of the wife will obviously be a pregnant factor.[59] The case of Schartner v. Schartner[60] is of particular relevance in this thesis. In this case a wife who had long since deserted her husband petitioned for divorce and sought maintenance. Although the husband was well able to pay, maintenance was refused on the ground that a marriage certificate was not a guarantee of maintenance for life and that the assumed dependence of a wife was an anachronism.

As to what is "fit and just" from the financial point of view, it has been held that the wife should not be relegated to a significantly lower standard of living than the husband [61] and if the husband could afford it, wife and children were entitled to retain their previous standard of living. [62] But the ability of a wife to obtain gainful employment will be an important factor. [63]

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[57] Suriano v. Suriano (1972) 1 O.R. 125.

[58] Zacks v. Zacks (1972) 35 D.L.R. (3d) 420.

[59] Naumoff v. Naumoff (1971) 2 O.R. 676; Clarke v. Clarke (1971) 4 R.F.L. 309. But see Omelance v. Omelance (1971) 20 D.L.R. (3d) 425 where a wife received maintenance despite her adultery which had taken place after marriage breakdown.

[60] (1970) 10 D.L.R. (3d) 61.

In Doyle v. Doyle, Hofstadter J. gave an admirable exposition of the salient points to which the court should have regard in this very important matter. He said: [64]

> "In evolving a modern system for fixing alimony and support the elements of (1) fault, (2) financial capacity and (3) need must be reappraised.
>
> Alimony should not be a reward for virtue nor a punishment for guilt. The element of fault should be deemphasized. Fault should not be a bar to alimony except in cases of gross culpability, such as infidelity or abandonment. In most cases neither party is at fault or both are in some degree. Generally, family break-ups are not due to specific acts of either spouse, legal fictions notwithstanding. They result rather from general malaise to which both have contributed. Fault usually comes after malaise has set in; it is the symptom not the cause of domestic discord.
>
> The factor of need, too, must be adjusted to woman's new position in our society. The married woman has come a long way since the days of Blackstone when she had no legal identity apart from her husband's; she is no longer the Victorian creature, 'something better than her husband's dog, a little dearer than his horse.' She is now the equal of man, socially, politically and economically. It is time that consonant with this new approach to woman's status we develop a modern basis for fixing alimony and support which will have its roots in reality.

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[61] McGowan v. McGowan (1972) 2 Nfld. & P.E.I. 413.

[62] Sharpe v. Sharpe (1971) 18 D.L.R. (3d) 380.

[63] Perrin v. Perrin (1968) 3 D.L.R. (3d) 139.

[64] (1957) 158 N.Y.S. (2d) 909.

A practical approach in awarding alimony would be to proceed on the basis of what we may term 'net need', the wife's actual financial requisite less her current assets and earning potential in relation to her husband's capacity to pay. If a woman proves need she should have support - but when she can, she should also be required to mitigate her husband's burden either by her own financial means of earning potential or both. The want alimony seeks to solve is economic - for alimony is basically the statutory substitute for the marital obligation of a husband to support his wife.

Each case must be treated as its particular circumstances indicate for there are many variables that should be taken into account in the determination of alimony. If a woman has contributed however indirectly to her husband's career and helped to increase his substance she may rightfully be regarded as entitled to a share of his gain. A woman who has devoted the greater part of her time to caring for a home and children has had little opportunity to learn the skills necessary to earn a living in our competitive society. The court should and will take cognizance of her plight.

But the same considerations do not operate in the case of a young woman who in all but form has remained alien to her husband's interest. Why should ex-wives and separated women seek a preferred status in which they shall toil not, neither shall they spin. Alimony was originally devised by society to protect those without power of ownership or earning resources. It was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent women into an army of alimony drones.

Ironically, inflated alimony awards are frequently not only financially disastrous to the man but psychologically deleterious to the woman. She remains hopelessly entangled in the web of the past, never establishing a new and independent life but "wandering between two worlds one already dead the other powerless to be born".

In the field of matrimonial litigation and alimony awards the husband and wife are not the sole parties. Society itself has locus standi for it is deeply affected in vital aspects. For the benefit of all concerned, we must proceed in a climate of sanity that will reflect modern reality and in a spirit of sympathetic understanding that will achieve justice and equity."

With regard to separation agreements in existence when the position is filed, the court appears to be able to make financial arrangements which are at variance with the terms of such agreements[65] but such agreements will be taken into account when deciding what orders should be made.[66]

The question has arisen as to when a lump sum rather than payments should be ordered and under what circumstances both would be appropriate. Lump sums have been ordered where the marriage was of short duration;[67] and to safeguard the needs of a family of modest means;[68] they have not been ordered where the wife already had sufficient capital for immediate needs.[69] There must be sufficient capital assets available to warrant such an order, "sufficient capital assets" being deemed to be a relative term.[70] Reversing an earlier decision[71] it is now clear that both a lump sum and periodic payments may be ordered.[72] It has also been held

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65. Snively v. Snively (1971) 19 D.L.R. (3d) 628; Kowaliuk v. Kowaliuk (1971) 18 D.L.R. (3rd) 16. But see Moshensko v. Moshensko (1969) 7 D.L.R. (3rd) 749.

66. Wong v. Wong (1972) 6 W.W.R. 161; Bertram v. Bertram (1974) 41 D.L.R. (3rd) 107.

67. L.H. v. L.H.H. (1971) 20 D.L.R. (3d) 190.

68. Raffin v. Raffin (1972) 1 O.R. 173.

69. Strachan v. Strachan (1970) 14 D.L.R. (3d) 125.

70. Hutchinson v. Hutchinson (1972) 25 D.L.R. (3d) 23.

71. Johnstone v. Johnstone (1969) 7 D.L.R. (3d) 14.

72. Feldman v. Feldman (1970) 14 D.L.R. (3d) 222; Raffin v. Raffin (1972) 1 O.R. 173.

that the court may order periodic sums to be paid or secured or both.[73] It will be noted that the court cannot in the first instance order a sale of the husband's property to secure periodic payments although this might later become necessary to enforce the security.[74]

With regard to the court's power to vary maintenance orders, compelling circumstances are required before the court will exercise its discretion[75] and such discretion does not extend to varying or rescinding a lump sum order.[76] Remarriage will only result in rescinding of an order where the remarried spouse no longer needs the support.[77] It is to be noted that the discretionary power of the court to vary or rescind corollary orders is not a license to reassess and fix de novo the amount of maintenance. The Act specifies that the power to vary must be exercised having regard to the conduct of the parties since the making of the order or any change in their respective condition, means or other circumstances.

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[73] Kumpas v. Kumpas (1971) 18 D.L.R. (3d) 609.

[74] Switzer v. Switzer (1969) 7 D.L.R. (3d) 638.

[75] Pugh v. Pugh (1970) 16 D.L.R. (3d) 318.

[76] Jankov v. Jankov (1971) 16 D.L.R. (3d) 556.

[77] Neal v. Neal (1972) 29 D.L.R. (3d) 254; Richards v. Richards (1972) 2 O.R. 596.

The main purpose of these maintenance provisions is to ensure that no spouse takes advantage of the Divorce Act to escape the responsibilities of marriage and children. All the circumstances of each case will be considered before an order is made so that if a wife has contributed directly or indirectly to her husband's career, or increased his assets, such contribution may constitute a basis for financial provision irrespective of her means.

d) Other Financial Relief

The Domestic Relations Act of Alberta provides that the court may grant alimony to either husband or wife in any case where the applicant would be entitled to a judgment of judicial separation or restitution of conjugal rights.[78] In such cases an order for alimony during the joint lives of the parties or some shorter period may be made.[79] It will be noted that when an interim or other order for alimony is subsisting, providing the payments are not in arrears, no liability for necessaries may be invoked.[80]

In order to prevent an apprehensive party from disposing of his or her real or personal property in order to avoid support obligations, an injunction may be granted when an application for alimony is made.[81]

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[78] Domestic Relations Act R.S.A. (1970) c.113 s.16.

[79] *Id.* s.18.

[80] *Id.* s.19.

[81] *Id.* s.20.

A useful provision of the Domestic Relations Act is that any alimony order, interim or otherwise, may be registered in any land titles office, binding the defendant's estate in the same manner as registration of a charge by the defendant of a life annuity on his lands.[82]

Where either party has obtained a judgment of judicial separation or a decree of divorce for adultery, the Domestic Relations Act empowers the court to order such settlement as it thinks reasonable of the other party's property for the benefit of the innocent party and of the children of the marriage, or either or any of them.[83]

The court may also order as it sees fit regarding property comprised in an ante or post-nuptial settlement after a decree absolute of divorce or declaration of nullity.[84] Furthermore, after a judgment for restitution of conjugal rights, any property, profits or earnings of the party against whom the judgment is made may be settled on the other party or the children of the marriage.[85]

The Act also provides that after a decree of divorce, or after a decree of nullity, the court may order either party to pay to the other such annual sums as the court deems reasonable having regard to the conduct and fortune of both and to the ability of the defendant to pay.[86] In addition, or as an alternative, the court may order either party to pay to the other during their joint lives such monthly or weekly sums for maintenance and support as the court thinks reasonable.[87] It is also provided that such orders may be made on a decree of divorce notwithstanding the adultery of the applicant.[88]

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[82] Id. s.21.

[83] Id. s.22.

[84] Id. s.24.

[85] Id. s.25.

The power to award maintenance in nullity cases, especially where the marriage was declared void, may seem rather odd. However, it has been held that orders may be made in such a case.[89] The general rule which the courts appear to have adopted is that maintenance will be granted in nullity cases according to the sense of propriety and moral justice of the court.[90] This sense of moral justice has even been stretched to cover a maintenance order for a bigamous wife.[91]

The Domestic Relations Act makes express provision for the variation of alimony or maintenance orders where the means of either party have changed or where either party has been guilty of misconduct or has remarried.[92]

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[86] Id. s.23(1).

[87] Id. s.23(2).

[88] Id. s.23(3).

[89] Restall v. Restall (1930) P.189.

[90] Gardiner v. Gardiner (1920) 36 T.L.R.294,295.

[91] Ambrose v. Ambrose (1962) 14 D.L.R. (2d) 438.

[92] R.S.A. (1970) c.113, s.26.

It will now be seen that section 23 of the Domestic Relations Act and section 11 of the Divorce Act both purport to give the Supreme Court power to order either spouse to pay maintenance to the other after a decree of divorce. It would appear that the federal statute is paramount and would override the provincial provisions on the ground that divorce is a federal matter and maintenance on divorce is part of that matter.[93]

The Domestic Relations Act makes special provision for Protection Orders in cases where a married woman has been deserted.[94] By desertion is meant where she is in fact deserted or where she is living apart on account of the husband's cruelty or refusal or neglect to supply her with food and necessaries.[95] The procedure to be followed in such a case is that the deserted wife applies to a justice of the peace who, on being satisfied regarding the facts alleged, may summons the husband to appear before a magistrate. Upon a finding of liability, the magistrate may order the husband to pay such periodic sums for the support of the wife, and children if any, as he considers reasonable having regard to the means of both parties.[96] The Act also makes provision for the granting to the wife of orders for the protection of children.[97] The protection order, or the refusal to issue such, may be appealed.[98]

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[93] Richards v. Richards (1972) 26 D.L.R. (3d) 264; see also Institute of Law Research and Reform, supra n. 31 at 8.

[94] Other provinces have similar legislation:
Deserted Wives' and Children's Maintenance Act R.S.O. (1970) c.128.
Deserted Wives' and Children's Maintenance Act R.S.S. (1940) c.234.
Deserted Wives' and Children's Act R.S.N.B. (1927) c.207.
Deserted Wives' Maintenance Act R.S.B.C. (1936) c.73.
The Wives' and Children's Maintenance Act R.S.M. (1940) c.235.

[95] Domestic Relations Act s.27(1).

[96] Id. ss.27(2)(3)(4).

Where an order is not complied with, a married woman may obtain a summons from a magistrate against her husband who must then show cause why the order should not be enforced. If the husband does not attend or cannot show cause the magistrate may enforce the order.[99]

The Alberta Act makes specific provision for cases of adultery in relation to protection orders. It is provided that no order shall be made in favour of a wife who has committed adultery unless it has been condoned; that an order may be rescinded where a wife, since the making of the order, has committed adultery which has not been condoned.[100]

With regard to the enforcement of maintenance orders each province has its own Reciprocal Enforcement of Maintenance Orders Act which provide for the recognition and enforcement of judgments outside the jurisdiction in question.[101]

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97. Id. s.27(7).

98. Domestic Relations Act s.27(8) through (16).

99. Id. s.28.

100. Id. s.29.

101. R.S.A. (1970) c.223; R.S.O. (1970) c.403; R.S.N.B. (1952) c.193; S.S. (1968) c.59; R.S.N.S. (1967) c.173; R.S.M. (1970) c.M20; R.S. P.E.I. (1951) c.139; R.S.N. (1970) c.224; Family Relations Act S.B.C. (1972) c.20 ss.48-60.

Finally, further mention should be made of the Maintenance Order Act in Alberta which provides for the support by either party of the other in any case of disability or destitution. It appears that this statute is rarely used.[102]

3. LAW REFORM

Recommendations are made by the Law Reform Commission of Canada with regard to economic adjustments after divorce.[103] Certain criteria are advocated with regard to maintenance. The basic principle is enunciated that marriage does not create a right to maintenance and, if granted, there is an obligation on the recipient to become self-supporting as soon as possible. It is advocated that maintenance only be granted where a need exists and that such need may justly arise from the division of function during the marriage; from an agreement to maintain; from arrangements made for custody of children and from physical or mental disability.

The foregoing examination of the law of support for dependents gives rise to the impression that there is need of reform.[104] In particular some general agreement needs to be reached as to what maintenance is meant to be: should it reflect a bare subsistence level or compensation to the wife for years of faithful service, or punishment of a guilty party? In addition, the constitutional division of powers between federal and provincial governments makes for overlapping provisions and increasing complication.[105] Criticism may also be levelled at the preponderance of vague generalizations such as "as the court thinks fit", "reasonable" sums, "such sums as are considered proper". As MacDougall describes them, "They represent empty vessels which can be filled with a distillation of contemporary social attitudes on the respective roles and obligations of husband and wife."[106]

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[102] Institute of Law Research and Reform, supra n.31 at 8.

[103] Working Paper on Divorce: No. 13 (1975).

[104] For a general discussion on the need for reform see MacDougall, Alimony and Maintenance in Mendes da Costa (ed) 1 Studies in Family Law (1972) 283; Cretney, The Maintenance Quagmire (1970) 33 M.L.R. 662; Law Reform Commission of Canada: Maintenance on Divorce (Working Paper 12) (1975).

It is therefore suggested that as long as the intent is to retain the element of judicial discretion in these matters, the use of such general phrases as above referred to is unavoidable. However, with a view to reducing the disparity in judicial decisions, it is recommended that maintenance be statutorily defined so that the courts are not left to interpret the Act in the light of their own philosophical attitudes.

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[105] Jordan, The Constitution and Ancillary Relief under the Divorce Act (1969) 27 The Advocate 260.

[106] Supra n. 104 at 291.

CHAPTER NINE

THE MARRIED WOMAN'S RIGHTS OF INHERITANCE

1. INTRODUCTION

The rules of devolution of property on intestacy vary in detail as between England and the various provinces of Canada.[1] However each jurisdiction seems to be satisfied on the whole that its system is equitable and no loud cry for reform is to be heard.

It is otherwise, however, with regard to the devolution of property where a husband dies testate. The current controversy over the distribution of matrimonial property on dissolution of marriage has extended to such distribution on death. While it is generally agreed that the various statutory provisions which exist in England and all Canadian provinces to alleviate hardship where a testator does not adequately provide for his dependants are fairly reasonable, it is felt that, if a matrimonial property regime is to be adopted, much more could and should be done in this area in the interests of consistency and fairness.

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[1] See generally, Bromley, Family Law 501 (1971); Bowker, Succession to Property in the Common Law Provinces (1958) Can. Jur. 242; Chapman, The Law and You 397 (1970): Hume, Anger's Digest of Canadian Law 433 (1967); Bowker, Cases on the Law of Wills 4-1 (1969).

2. INTESTATE SUCCESSION

a) In England

When a husband dies intestate, the surviving widow is entitled to all personal chattels [2] which include all household effects, cars, jewellery and such like but excluding any thing used for business purposes. [3]

What the widow takes apart from the personal chattels depends on what other relatives are still surviving. If there is neither issue nor parent nor brother or sister of the whole blood or issue of such, the widow takes all absolutely. If the deceased left children or remoter issue, the widow receives a fixed share and a life interest in half the residue. [4] If there were no issue but a close relative the widow receives a larger fixed share and an absolute interest in half the residue. [5] Should the widow seek to have her life interest redeemed, she may require the personal representatives to pay over the capital value but she must generally elect to do so within 12 months after representation is taken out. [6]

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[2] Administration of Estates Act (1925) s.55(1)(x).

[3] The fact that the property might have been regarded as an investment does not prevent it from being described as a personal chattel, Re Reynolds' Will Trusts (1965) 3 All E.R. 686 (valuable stamp collection).

[4] Family Provision Act (1966) c.35 s.1(1) as amended by Family Provision (Intestate Succession) Order (1972) (S.I. 1972 No. 916) art. 2. The fixed share is now £15,000 free of death duties and costs with interest at 4% per annum until paid.

[5] The fixed share in this case is now £40,000 free of death duties and costs with interest at 4% per annum until it is paid.

[6] Administration of Estates Act (1925) s.47(A) as amended.

It will be noted that whereas, for other purposes, when it is uncertain which spouse died first the elder is deemed to have predeceased the younger, this rule of commorientes does not apply as between an intestate spouse and the surviving spouse. [7] The reasoning behind this exception is that where there are no issue it would be undesirable to have the presumption operate to place a large sum at the disposal of parents-in-law rather than parents.

Where the deceased's estate comprised an interest in the matrimonial home the widow may usually require appropriation of the home in or towards satisfaction of any absolute interest she has in the estate and where the value of the home exceeds the value of her survivor's interest, she may pay the excess. [8] In the event that the widow's funds are inadequate to acquire the home it will be remembered that her right of occupation is protected by the Matrimonial Homes Act of 1967. [9]

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[7] Id. s.46(3) as amended.

[8] Intestates' Estates Act 1952, 2nd. Sched. Personal representatives cannot sell the home for 12 months so that the widow may thus elect. It will be noted that these provisions do not apply to a lease with less than two years to run (para. 1(2)). Short periodic tenancies are therefore outside these provisions but in such cases the tenancy, if protected by the Rent Act, becomes a statutory tenancy giving protection to the survivor. These provisions will also not apply where the home, at death, formed part of a building, or was held with agricultural land, an interest in which was comprised in the residuary estate; where the home or part thereof was used as an hotel or lodging house; and where a part of the home was used for other than domestic purposes (para. 2).

[9] Supra, Chapter Five.

The importance of making a will in England can thus be seen for where the husband dies intestate his immediate family may have to share the estate with the parents, brothers and sisters of the deceased and this may well be contrary to his real wishes.

b) In Canada

Each Canadian province has its own legislation concerning intestate succession.[10] In Alberta[11] where the husband dies leaving a widow and issue, the widow is entitled to a fixed share[12] in the deceased's estate. The residue is divided between widow and issue as to one half to the widow where there is only one child, and one third where there is more than one child. The issue of any child who predeceases the intestate will take *per stirpes* the share of that parent.[13] Where the intestate dies leaving a widow and no issue, the widow takes all.[14] It is also provided that where a wife has left her husband and is living in adultery when he dies, she shall take no part of her husband's estate.[15]

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[10] The Devolution of Estates Act R.S.O. (1970) c.129;
The Devolution of Estates Act R.S.M. (1970) c.D70;
The Devolution of Estates act R.S.N.B. (1952) c.62;
The Intestate Succession Act R.S.S. (1965) c.126;
The Intestate Succession Act R.S.N. (1970) c.183;
The Intestate Succession Act R.S.N.S. (1967) c.153;
Administration Act R.S.B.C. (1960) c.3;
Probate Act R.S.P.E.I. (1951) c.124.

[11] Intestate Succession Act R.S.A. (1970) c.190.

[12] $20,000 net with interest from date of death.

[13] Intestate Succession Act R.S.A. (1970) c.190 s.3.

British Columbia, Manitoba and Saskatchewan have followed the Alberta model.[16] In the eastern provinces, however, the widow must share with the intestate's next-of-kin if there are no children.[17] If there is one child the widow and the child share equally in the residue and if there is more than one child the widow takes one third thereof. In Nova Scotia, Newfoundland, Prince Edward Island and New Brunswick the widow receives a varying fixed share from the estate.[18] If there are no children the widow, in addition to her fixed share, receives one half of the residue while the other half goes to the deceased's next-of-kin, if any. If there is one child the widow shares the residue equally with the child but if there is more than one child she takes one third of the residue, the remainder going to the children. In New Brunswick the spouse also receives the deceased's personal chattels. In all provinces where the deceased's next of kin are entitled, if there are no such kin at the time of death the widow takes their share.

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[14] _Id_. s.5.

[15] _Id_. s.18. This provision also applies to the husband _mutatis mutandis_.

[16] Except that the $20,000 entitlement of the widow is $10,000 in Manitoba and Saskatchewan.

[17] In Ontario a widow receives the first $20,000 of the estate and if there are kin of the deceased still alive, they take one third of the residue.

[18] The first $25,000, $30,000, $50,000 and $50,000 respectively.

A deceased's next-of-kin [19] are firstly lineal descendants and then collateral relations. The lineal descendants are the children; they will take in equal shares regardless of age or sex or whether they have been adopted by the parents or are natural born. A child is still entitled who was born posthumously or was a mother's illegitimate child or whose parents married after the birth. [20] If an intestate had no lineal descendants, collateral relatives will be the next-of-kin. Concerning this group, the closest relative takes all unless there are more than one equally removed in which case they share equally per capita. The priority list generally goes from parents to siblings [21],

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19. See generally Chapman, supra n.1 at 400.

20. But in Quebec and Nova Scotia an illegitimate child is not legitimized by the subsequent marriage of the parents and therefore cannot take.

21. But in Ontario and Quebec siblings share with the parents; equally in Ontario and in Quebec parents take one half and siblings one eighth. Siblings are brothers or sisters of either the whole blood or the half blood. It is to be noted that the per stirpes principle also applies where an entitled sibling has predeceased the deceased.

to grandparents,[22] to nephews and nieces, to uncles and aunts, to great grandparents. Remote relatives are then considered; first cousins, grand-nephews, great uncles and so on, but relatives by marriage are not included.

In provinces with dower legislation a surviving wife will retain her right to dower in the deceased husband's estate[23] unless she elects to abandon this right. If she does not so elect she is not entitled to a complete share but if she does elect to abandon her dower rights she is entitled to a distributive share in accordance with the law of succession in her province.[24]

Unlike England, the doctrine of commorientes applies throughout Canada for the purposes of intestate succession but if one of the spouses in a simultaneous death carried life insurance in favour of the other, the beneficiary is deemed to have predeceased the insured.[25]

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22. While normally grandparents share equally, in Quebec one half goes to the maternal line and the other half to the paternal line.

23. But where she is living apart and disentitled to alimony no interest will vest under the Alberta Dower Act and she must take in accordance with the Intestate Succession Act, Re Rudiak (1958) 13 D.L.R. (2d) 566.

24. But in Manitoba the Dower Act provides that the survivor is entitled to a life estate in the homestead and in the event of an intestacy will be entitled in addition to the full share under the Devolution of Estates Act.

25. Chapman, supra n.1 at 402.

3. TESTATE SUCCESSION

a) In England

In order to avoid the hardship occasioned when a husband devised and bequeathed all his property to strangers or to charity, the Inheritance (Family Provision) Act was passed in 1938.[26] This Act, which is still in force in amended form, provides that where the testator has failed to make adequate provision for his dependants, the court is empowered to order such reasonable provision as it thinks fit. It has been held, however, that where small estates are concerned, the court should be slow to interfere with the testator's wishes.[27] In a subsequent amendment to this Act, the Intestates' Act of 1952 made an important extension of its provisions in order to cover cases of intestacy where the intestacy laws had proved inadequate. Time is of the essence in that application must be made within six months of the date when representation is first taken out[28] and the person against whose estate the claim is being made must have died domiciled in England.

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[26] See generally Tyler, Family Provision (1971); Gold, Freedom of Testation: The Inheritance (Family Provision) Act (1938) 1 M.L.R. 296. The Inheritance (Family Provision) Act of 1938 as amended is set out in the Third Schedule to the Family Provision Act of 1966 which Act represents the present position apart from amendments to the figures to keep pace with the decreasing value of the pound. For a criticism of this Act see Stone, The Economic Aspects of Death in the Family 8 J.S.P.T.L. 188.

[27] Gregory v. Goodenough (1971) 1 All E.R. 497.

[28] Family Provision Act (1966) Sched. 3 s.2(1).

For the purposes of this legislation, dependants are defined as the spouse of the deceased; [29] an unmarried daughter or one who is through physical or mental disability incapable of maintaining herself; a son under the age of majority or who is through physical or mental disability incapable of maintaining himself, or the surviving party to a void marriage with the deceased. [30] But the court's power to provide for such a surviving party has the limitations that the marriage must not have been annulled or dissolved, the deceased must not have entered into a later marriage even if voidable or void, and the court must satisfy itself that it would have been reasonable for the deceased to have made the provision required. [31]

In order to be successful in an application for this type of relief it is necessary to show that the testator had acted unreasonably in light of all the circumstances. [32] There has been some controversy as to whether the test of reasonableness is subjective or objective. In

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[29] The burden of proof is on the widow to show she is the wife of the deceased, Re Peete (1952) 2 All E.R. 599. It will also be noted that a second or subsequent wife may be an applicant, Re Blanch (1967) 2 All E.R. 468.

[30] Family Provision Act (1966) Sched.3 s.1(1) as amended by the Law Reform (Miscellaneous Provisions) Act (1970) s.6. A surviving party to a void marriage is defined as one who "had in good faith entered into a void marriage with the deceased".

[31] Id.

[32] See Tyler, supra n.14 at 39.

Re Howell [33] the Court of Appeal was of the view that it should be a subjective test but in Re Goodwin [34] it was held that the test was objective in that, in this case, it was not the reasonableness of the testator's actions which should be considered but rather the reality of the dependant's financial position. In the later case of Re Gregory [35] the Court of Appeal appears to have upheld the subjective view.

The requirement of unreasonable action in order to invoke the protection of this Act has been affected by the emancipation of women in that with the diminishing disparity between the earning power of the spouses it is increasingly being held unreasonable for the wife who dies testate not to have made proper provision for her husband. [36]

The court may make three types of orders: interim orders where there is immediate need, final orders for periodical payments upon which may be imposed conditions and restrictions as the court may require, and orders for a lump sum either with or in lieu of periodical payments. It is also provided that such orders may be varied and will cease where the surviving spouse remarried, on a daughter's marriage, on a son's majority or the cesser of a dependant child's disability.[37]

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[33] (1953) 2 All E.R. 604.

[34] (1968) 3 All E.R. 12.

[35] (1970) 1 W.L.R. 1455.

[36] Re Clayton (1966) 2 All E.R. 370; Re Wilson (1969) 113, Sol.J. 794.

With regard to a former spouse whose marriage to the deceased was annulled or dissolved, if such a person has not remarried the court may make provision for him or her if satisfied that it would have been reasonable for the testator so to do. The court in such a case will have regard to the income and capital, past, present and future, the applicant's conduct in relation to the deceased and any other relevant circumstances.[38]

b) In Canada

As in England, the provinces of Canada, with the exception of Prince Edward Island, have sought to protect the family of a husband who dies testate but who has failed to make adequate provision for the maintenance and support of his dependants.[39]

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[37] Id. ss.1(1)(2)(4),4(1).

[38] Matrimonial Causes Act (1965) s.26(1)(2)(4)(6).

[39] The Dependant's Relief Act R.S.O. (1970) c.126;
The Dependant's Relief Act R.S.S. (1965) c.128;
Testator's Family Maintenance Act R.S.M. (1970) c.T-50.
Testator's Family Maintenance Act R.S.B.C. (1960) c.378;
Testator's Family Maintenance Act N.B.S. (1959) c.14;
Testator's Family Maintenance Act R.S.N.S. (1967) c.303.
Family Relief Act, S. Nfld (1962) c.56.

See generally Laskin, Dependent's Relief Legislation (1939) 17 Can. Bar Rev. 367; Brown, Dependent's Relief Acts (1940) 18 Can. Bar Rev. 261,449; Bale, Limitation on Testamentary Disposition in Canada (1964) 42 Can. Bar Rev. 367.

The Alberta statute [40] provides that, notwithstanding anything contained in the will of a deceased or in the Intestate Succession Act, a judge may, on application by dependants of the deceased within six months of the grant of probate, make orders in his discretion for their proper maintenance and support out of the deceased's estate. [41] On such an application the judge must inquire into and consider all relevant matters including evidence of the deceased's reasons for the dispositions he did or did not make [42]. The judge may refuse an order if he believes the applicant dependant to be disentitled by reason of character or conduct [43] and he must always bear in mind benefit which may accrue to a widow by virtue of the Dower Act. [44]

The judge, subject to such conditions and restrictions as he sees fit to impose, may order maintenance and support in the form of periodic payments or a lump sum or by transfer or assignment of property or any combinations of these. [45] He may also subsequently vary, discharge or suspend such maintenance orders as he deems fit. [46] Such orders are effective as from the date of the deceased's death. [47]

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40. Family Relief Act R.S.A. (1970) c.134. (Alberta was the first Canadian province to introduce such legislation).

41. *Id.* ss.4(1)(16).

42. *Id.* s.4(2).

43. *Id.* s.4(5).

44. *Id.* s.5.

45. *Id.* s.6(3).

46. *Id.* s.7.

47. *Id.* s.12.

The legislation in the other provinces concerned is similar to that of Alberta. Saskatchewan however makes it explicit that a husband must leave his widow as much in his will as she would be entitled to receive on intestacy.[48] It is also to be remembered that a widow's dower rights cannot be extinguished by her husband's will unless she has so agreed. If the will makes no mention of dower rights the widow is entitled thereto in addition to that which has been left to her in the will.[49]

What constitutes adequate provision for the proper maintenance and support of a testator's wife is an ever-recurring problem. Most cases when reviewing the law on this point start off from the New Zealand case of Allardice v. Allardice which was subsequently confirmed by the Privy Council.[50] The important principles affirmed in this case were:

a) that the Act is something more than a statute to extend the provisions in the Destitute Persons Act;

b) that the Act is not a statute to empower the Court to make a new will for the testator;

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48. Dependant's Relief Act R.S.S. (1965) c.128 s.9(2).

49. Anger's Digest of Canadian Law, supra n.1 at 393.

50. (1910) 29 N.Z.L.R. 959; (1911) A.C. 730.

c) that the Act allows the Court to alter a testator's disposition of his property only in so far as it is necessary to provide for the proper maintenance and support of wife, husband or children when adequate provision has not been made for their proper maintenance and support by the will of the testator;

d) that in the case of a widow, at all events, if not in the case of a widower, the Court will make more ample provision than in the case of children, if the children are physically and mentally able to maintain and support themselves.

In Walker v. McDermott [51] Duff J. in delivering a majority judgment said:

> "What constitutes 'proper maintenance and support' is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had.

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[51] (1931) 1 D.L.R. 662 (S.C.C.). The reasoning in this case was approved in Re Jones Estate (1962) 32 D.L.R. (2d) 433 (S.C.C.).

> If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator must be taken into account."

A comprehensive review of the cases concerned with "proper maintenance and support" was undertaken in Re Lawther [52] where it was concluded that the court should take into account the following circumstances:

1. The size of the testator's estate;

2. The size of his family;

3. The ages of his dependants;

4. The station in life of the testator and his dependants;

5. The character and views of the testator;

6. The wishes of the testator, if his failure to perform his duty is due to omission or oversight; (e.g. an expressed intention, not carried out, to make further provision by will);

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[52] (1947) 2 D.L.R. 510.

7. The relative needs and deserts of the claimants (if the estate is small and the claimants are numerous);

8. The possibility of changes in existing circumstances;

9. The future value of money and rates of interest;

10. The opinions and wishes of a just and wise mother about the education and mode of life of the children of herself and the testator;

11. The situation arising when the testator has been married more than once;

12. The personal income of the dependants;

13. The competing moral claims on the bounty of the testator;

14. The health and mental capacity of the dependants;

15. In the case of a widow, the kind of maintenance to which she had been accustomed during the life of the testator, or to which she would have been accustomed if her husband had then done his duty to her, all this involving a consideration of (a) the size of the house in which she is to live, (b) the cost of fuel, living expenses, clothing, and replenishing household furnishings, (c) taxes, including income tax,

> (d) employment of domestic servants and of persons to tend furnace and grounds, if such servants had been employed in the husband's lifetime or become necessary because of his death or the disability of the widow, (e) the necessity for the use of a motor car and the employment of a driver, (f) the need for medical care or treatment, (g) travelling, particularly if it is necessary to winter in a milder climate. . . .

Another view point was expressed by the British Columbia Court of Appeal where it was said that the allowance to be granted when the testator had failed to make adequate provision should be measured by the portion of the estate the applicant would have received had the testator died intestate. [53] This view has been emphatically refuted by the Alberta Supreme Court. [54]

It appears that a widow has been held still entitled to apply for relief even where she had been separated from the deceased for some twenty years prior to his death and under a separation agreement was not entitled to support. [55] On the other hand a widow has been held disentitled where she had been actively seeking a divorce and was only prevented by the husband's death. [56]

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[53] Barker v. Westminster Trust Co. (1941) 3 W.W.R. 473.

[54] Re Willan Estate (1951) 4 W.W.R. (N.S.) 114.

[55] Re Edwards (1961) 31 D.L.R. (2d) 308.

[56] Re Shirley Estate (1966) 55 W.W.R. 56.

As to whether a wife can contract out of her right to inheritance relief during her husband's life, Ontario cases seem to support the view that this cannot be done but that she may become disentitled if living apart in circumstances precluding alimony and so an agreement may be a bar if it precludes alimony.[57]

While the Testator's Family Maintenance Act of Manitoba is similar to the Alberta Act, a different situation obtains in that Province.[58] The Dower Act of Manitoba provides that generally the widow is to receive one third of her husband's estate in addition to a life interest in the homestead.[59] Where the right to a one third share does apply, the widow must elect. The purpose of the Dower Act is to assure the widow of one third of the estate while the purpose of the Testator's Family Maintenance Act is to provide for her maintenance - there being cases where a one third share would not suffice for maintenance.[60] But if a widow applies under the Testator's Family Maintenance Act she has no right to elect under the Dower Act.

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57. Smith v. National Trust Co. (1959) 15 D.L.R. (2d) 520. But see Lieberman v. Morris (1944) 69 C.L.R. 69 (Aust. High Ct.) where it was held that a wife could contract out.

58. The Dower Act R.S.M. 1970 c.D-100.

59. Id. ss.15,16.

60. Re Blackmore (1948) 1 W.W.R. 1001.

4. TESTATE SUCCESSION REFORM

a) The Need for Reform

The widow's rights on intestacy ensure her a reasonable share in her husband's estate. But the rules of testate succession are such that this may not always be so. In England, as had been seen, the widow's rights where her husband died testate may be protected by the Family Relief Act. They are also protected in England by the Rent Restriction Acts, by the Matrimonial Homes Act and by the "housekeeping money" provision of the Married Women's Property Act of 1964. In Canada the widow's rights are protected by the Family Relief Act and by dower legislation.

The protections above mentioned are sometimes more apparent than real in that the security of tenure in a rented home in England may prove illusory where an enterprising landlord succeeds in evading these Acts. A widow may be persuaded to deprive herself of the dower protection in Canada in order to promote the sale of the property. Again, in either country, the husband may have successfully divested himself of much of his property prior to death where he did not wish his widow to benefit.

Problems such as these contribute in part to present dissatisfaction with discretionary relief and create interest in a system of fixed shares on death as being the only sound way of protecting the widow's inheritance rights. But there is another reason. Inheritance laws have always been based upon the need to provide maintenance for the widow; to provide adequate food, clothing and shelter. The married woman of today, however, who may have contributed equally to the family welfare either by her work without or within the home, is seeking more than mere maintenance; she is seeking a fair if not equal share in her deceased husband's estate, such as she might claim on divorce.

As will later be seen from the proposals for reform in England and Canada, the choice of matrimonial property regime will largely determine whether a country or province decides to go the discretionary route or the fixed share route in the matter of inheritance rights.

b) Proposals for Reform in England

As an alternative to the court's power to make provision for dependants where the deceased's will failed to do so, a system of legal rights of inheritance has been advocated. The essential difference between the two schemes would be that whereas the present family provisions leave it to the courts to use their discretion to effect justice in light of all the circumstances, a system of legal rights of inheritance would establish a fixed proportion of the testator's estate to which the spouse would be entitled without need to have recourse to the courts.

The Law Commission's Working Paper on Family Property Law examined both these schemes.[61] Despite the advantage of certainty which attaches to legal rights of inheritance, the Law Commission claims that the discretionary system of family provision commands greater support because of the rigidity of the former and the flexibility of the latter.[62]

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[61] Working Paper No. 42 215 (1971).

In its Report the Law Commission sees the issue as whether or not it is necessary to supplement or reinforce existing family provision law by a system of legal rights.[63] It starts off from the premise that a surviving spouse should have a claim upon family assets at least equivalent to that of a divorced spouse. The Commissioners believe that this goal can be achieved if the family provision court is enabled on an application for family provision to have regard to the same criteria as are applicable in proceedings for financial provision on divorce;[64]

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[62] For a criticism of the discretionary system with its uncertainty and the costs and the trauma of legal action see Gold, Freedom of Testation (1938) 1 M.L.R. 300-302; Guest; Family Provision and the Legitima Portio (1957) 73 L.Q.R. 87.

[63] First Report on Family Property: A new Approach 12 (1973).

[64] The criteria for making financial provision on divorce (Matrimonial Causes Act (1973) S.25(1)) are:

-- the income, earning capacity, property and other financial resources, the financial needs, obligations and responsibilities of the parties now and in the future

-- the previous standard of living of the family

-- the age of each party and the duration of the marriage

-- any physical or mental disability of either party

-- the contributions made by each to the family welfare including the contribution of looking after the home and caring for the family

-- the value to either party of any benefit which will not accrue because of dissolution of the marriage.

that is, that the court have the broadest powers to make financial readjustment recognizing that normally a wife should be deemed entitled to a share in the capital assets of the family. This would entail a change in the objective of family provision from the point of view of the surving spouse. Presently the aim is to secure reasonable provision for the maintenance of the surviving spouse whereas the reformed aim would be to secure for her a fair share, as is the aim in current divorce legislation.

The Law Commission Report points out the dangers inherent in a legal rights system.[65] It contends that the fixed share might be seen as the maximum entitlement and lead to the drawing up of a will prejudicial to the survivor. Moreover, legal entitlement to a fixed share might lead to an unpredictable exercise of the court's discretion in family provision cases. The Commission believes that the advantages to be derived from the automatic operation of legal rights of inheritance would be offset by the disadvantages of rigidity and possible incompatibility with the standards on divorce provisions and it therefore concludes that if co-ownership of the matrimonial home were introduced and family provision legislation strenthened, a system of legal rights of inheritance would be unnecessary.[66]

It is submitted that for England the discretionary system, despite the element of uncertainty, is preferable because it ensures the maximum

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65. First Report on Family Property: A New Approach 14 (1973).

66. Supra at 15.

testamentary freedom, and the power of the court to vary a will is conducive to proper provision being made by the testator. Further, it enables the court to balance freedom of testation with legitimate claims so that proper regard is had to the particular circumstances of each case.

c) Proposals for Reform in Canada

The Alberta Institute of Law Research and Reform has examined various possibilities concerning an equitable distribution of matrimonial property upon the death of either spouse.[67] The Institute's Report discusses a proposal that the matrimonial property regime, which it advocates during life, should not apply on death on the ground that there is not sufficient need to change the present arrangements. This proposal claims that the present law already provides reasonable provision for a surviving spouse and with a few minor amendments would prove quite satisfactory. The Institute discarded this point of view on the ground that where a statutory property regime is terminated by death of a spouse the survivor should be able to apply to the court for an order determining the rights of the parties in the same manner as it is proposed that an application for a balancing payment may be made by a spouse upon dissolution of the marriage during the lifetime of both spouses.[68]

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[67] Report No. 18: Matrimonial Property 91 (1975).

[68] Supra, Chapter Five s.4(e).

Another proposal considered by the Institute is for deferred sharing on death such that if the deceased spouse had more than his appropriate share of the shareable gains the estate would share with the survivor: conversely if the survivor had more than her appropriate share, she must share her gains with the deceased's estate. While the Institute's work is premised on equal sharing between husband and wife, the Institute claims that this is only with regard to the spouses while alive and it is not prepared to follow the logic of its arguments through to death because of the resultant conflict with the fundamental principle that each spouse has a right and a duty to use their resources for the support of the survivor.

The majority of the Institute of Law Research and Reform have adopted a third alternative which is that the survivor be entitled to share with the estate where the estate has more than the deceased's proper share of the shareable gains of the marriage. But, unlike the previous proposal, the survivor would not be obliged to make a balancing payment to the estate where the reverse situation obtained. One exception to this recommendation is advocated in order to relieve hardship occasioned by the situation where the deceased left dependant children from a previous marriage. In such a case the Institute recommends that such a child should be entitled to apply for maintenance payments from the surviving spouse, such payments not to exceed any balancing payments which would have been payable if the matrimonial property regime had been operable in favour of the estate, and always providing that the survivor was not deprived of adequate maintenance thereby. It is to be remembered that any claim under this proposal would not affect the right of a surviving spouse to make application under the Family Relief Act for maintenance.

The Law Reform Commission of Ontario recommends a similar reform to that of the majority of the Albertan Institute but with the one important difference that not only should the property accumulated during marriage be shareable but also the value of the separate property of the deceased.[69] The reasoning here is that because the deceased spouse is not available to give evidence, it would be difficult to ascertain the true values of the items to be deducted. Furthermore the executor or administrator must do his best for the estate and may not feel able to agree on values; difficulties of evaluating property being greater on death since marriage has usually laster longer than when dissolved. The majority of the Alberta Institute, while acknowledging the validity of these arguments, maintain nevertheless that they prefer to adhere to the original principle of sharing only the gains acquired during marriage.

It is not possible to compare the Canadian with the English proposals for reform in testate succession because each has based its proposal in this regard upon its own solution for the distribution of matrimonial property during the lifetime of the spouses.

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[69] Part IV Family Property Law (1974) 88,192. The precise recommendation is: "In those cases where the matrimonial property regime is terminated by the death of a spouse, the equalizing claim should be calculated on the basis of the net estate of each spouse, rather than on their residuary estates".

It is recommended in this thesis that, contrary to the majority view of the Alberta Institute of Law Research and Reform, in the event that a system of deferred sharing is adopted during the lives of the parties, the shareable gains should be distributed in the same manner on the death of either spouse as on dissolution of marriage. This would mean that on death of either spouse, not only would the survivor be able to claim from the deceased's estate if a balancing payment were due to the survivor, but that if the balancing payment would have been payable to the deceased such payment should be payable to the estate by the survivor. In the event that such payment would create financial hardship to the survivor, application could always be made through the Family Relief Act. It would also be possible for the testator to will that such payment be not required. It is submitted that this recommendation carries to a logical and consistent conclusion the attempts to establish true equality between the sexes.

CHAPTER TEN

CONCLUSION

A. RESUMÉ

A study of the married woman's rights and duties at common law results in a clear picture of a class of society which was held in subjection, underprivileged, and almost devoid of those rights which in the world of today are generally considered to be the birthright of all individuals.

With equity to the rescue the picture began to change and successive statutory reforms, clumsy and tardy though they oft-times were, gradually improved the position of the married woman so that by the mid-20th Century her position, although still unsatisfactory in many areas, could no longer be said to be intolerable: indeed, in many important areas she by then had equal rights with men and unmarried women.

The legal capacity of a woman was always detrimentally affected by marriage, both at the level of her personal rights and her civil rights. Concerning a married woman's name, the general view exists in both England and Canada that it is a matter of custom rather than law that she adopt her husband's name. However, the bureaucratic nature of our society is such that in practice it is not only extremely difficult to retain a maiden name on marriage but it is wellnigh impossible, having adopted the husband's name, to seek to revert to the maiden name. A specific point of irritation is the rendering invalid of a woman's passport unless a change of marital status and the husband's name are endorsed thereon.[1] However it must be noted that neither the succession nor the contractual rights of a married woman are affected by the married woman's decision regarding her name.[2]

An exception to the usual trend away from the common law attitude toward married women is the present day position concerning her nationality.[3] In both England and Canada a woman's nationality no longer undergoes a change upon marriage to a husband of another nationality, as appeared to have been the early common law situation which suffered reverse in the 19th Century. Unfortunately, Canada has not seen fit, as

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1. Supra, Chapter Three s.A2.
2. Turner-Samuels, The Law of Married Women 345 (1957).
3. Supra, Chapter Three s.A3.

has England, to give retrospective effect to the enabling legislation in this area so that a special application is required for restoration of Canadian nationality in cases where a woman had lost it on marriage prior to the reforming legislation of 1946.[4] Another bone of contention in this area is the discrimination which still exists against the married woman in the matter of the nationality of the children of her marriage. A child automatically inherits the father's nationality even if the child lives with the mother in her country of origin. Moreover, the mother cannot apply to have the child's nationality changed in such a circumstance, such application only being possible where made by the "responsible parent", which normally means the father.[5] A blatant case of discrimination exists in the case of the nationality of the North American Indian woman who marries. Upon marriage to a non-Indian she loses her Indian status and all concomitant rights and privileges whereas this situation does not obtain when an Indian man marries a non-Indian.[6]

Until recent times there still existed an unfortunate remnant of the outmoded legal doctrine of unity of spouses; the fact that upon marriage a woman lost her own domicile and automatically acquired that of her husband.[7] Furthermore she retained her husband's domicile after divorce,

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4. The Canadian Citizenship Act R.S.C. (1970) c. C-19.
5. Royal Commission on the Status of Women in Canada 363 (1970).
6. The Indian Act R.S.C. (1970) c.1-6 s.12(1)(b).
7. Supra, Chapter Three s.A4.

judicial separation, when living apart, or until a voidable marriage was annulled. Inroads were gradually made on this principle, particularly in relation to divorce law where domicile is an integral element in jurisdiction. Thus in England, since January 1, 1974, the domicile of a wife is no longer deemed to be that of her husband for any purpose, merely because she is married to him.[8] Canada has still some way to go before achieving complete independent domicile for the married woman. Federal legislation has now enabled a wife to claim independent domicile for purposes of divorce proceedings[9] but in other matrimonial matters, which come under provincial authority, the married woman is usually subject to a dependent domicile. Alberta has been more forward than other provinces in this regard in that an Albertan wife may now acquire an independent domicile after a judgment of judicial separation.[10]

In addition to the personal rights just mentioned, the civil rights of the married woman have undergone very considerable change in modern times. With the Law Reform (Married Women and Tort Feasors) Act of 1935 a married woman was finally enabled to sue and be personally sued on her contracts as if a feme sole.[11] A similar step was then taken in Canada by appropriate amendments to the various Married Women's Property Acts of the Provinces. A married woman has of course been able to pursue a trade or business separately from her husband since 1882 and is now subject to the insolvency and bankruptcy laws as a matter of personal liability.

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[8] Domicile and Matrimonial Proceedings Act (1973) c.45 s.1.

[9] The Divorce Act R.S.C. (1970) c.D-8 s.5.

[10] The Domestic Relations Act R.S.A. (1970) c.113 s.11(b).

[11] Supra, Chapter Three s.B1.

The advent of the Welfare State in England and the general change in attitude towards matrimonial relief caused the deserted wife's agency of necessity to be abolished in England in 1970.[12] In Canada the doctrine of the wife's agency of necessity is still alive but is increasingly being viewed as an anachronism. The agency of the cohabiting wife is still presumed but as a rebuttable presumption of fact rather than a presumption of law.

Concerning husband and wife in the law of tort, relief for the husband came in 1935 in England when he ceased to be liable for his wife's torts and the wife then found herself able to sue and be sued as if a feme sole.[13] Again Canada, for the most part, has followed suit.[14] While a married woman has, for some considerable time, been able to sue her husband in tort for the protection and security of her property, the definition of "property" for this purpose is becoming increasingly elastic. The unjust situation whereby the husband did not have a like remedy against his wife has now been generally rectified. The longstanding principle of inter-spousal immunity in tort fell in England in 1962, each spouse now having a like right of action in tort against the other as if they were unmarried.[15] Canada has not yet seen the way to making this break with the traditional view but the injustice and illogicality of the rule, based on an outmoded view of the marital state, will surely lead to change before long.

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[12] Matrimonial Proceedings and Property Act c.33 s.41(1), (2).

[13] The Law Reform (Married Women and Tortfeasors) Act (1935) 25 & 26 Geo.5. c.30 s.3.

[14] Supra, Chapter Three s.B2.

[15] The Law Reform (Husband and Wife) Act (1962) 10 & 11 Eliz.2 c.48 s.1(1).

As a remnant of the old common law view of the wife as being the property of the husband, we still find that while the husband may sue any person whose tortious act against his wife deprives him of her consortium, the reverse situation does not obtain. To the credit of Alberta, that Province stands alone in providing legislation to enable this right of action to be exercised by either spouse.[16] The antiquated actions for enticement, harbouring and criminal conversation have been abolished in England; as has the right of the husband to claim damages from a man who had committed adultery with his wife.[17] These actions are still to be found in most Canadian Provinces and again only Alberta has legislated to give also to the wife the right to claim damages for adultery.[18]

Since a marriage certificate is no longer considered to carry with it lifelong economic security for the married woman, the State provides certain benefits for her. These are family allowances, social assistance (or "welfare"), health care, retirement and old age pensions, widows' pensions and death grants.[19] There exists considerable variation between the English and Canadian provinces in the matter of State benefits. In general the benefits are greater in England, particularly in health care where there is a very comprehensive scheme. However, one would hesitate to recommend that Canada seek to emulate England in this regard since the much-vaunted Welfare State in England has undoubtedly been instrumental in bringing about the extreme financial woes in which that country

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16. The Domestic Relations Act (1970) c.113 as amended (1973) c.61 s.35.
17. The Law Reform (Miscellaneous Provisions) Act (1970) ss. 4, 5.
18. The Domestic Relations Act (1970) c.113 as amended (1973) c.61 s.14.
19. Supra, Chapter Three s.B3.

finds itself today. This is not to say that the Canadian position on State benefits is unsatisfactory. However, the recent extention of pension benefits to the spouse of the pensioner is a much needed step in the right direction.[20]

In the realm of criminal law the legal capacity of a married woman has undergone change. A wife who commits an offence is no longer deemed to be acting at the behest of her husband,[21] but it will be a good defence to show that she acted under his coercion. In England, either spouse may now bring criminal proceedings against the other as if they were unmarried[22] but special consent for such action is required with regard to the stealing or damaging of a spouse's property. In Canada however a wife can only take such proceedings against her husband concerning her property when leaving or deserting him.[23] In various other matters the old common law attitude that the wife is incapable of independent action remains in Canada but has been abolished in England.[24]

In the area of personal property rights of a married woman (for example gifts, the wife's savings, bank accounts), there have been amendments to the English law which would be very welcome in Canada. However, since the whole matter of the property rights of the married woman are currently under review there may be no point at this date in attempting

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20. Old Age Security Act R.S.C. (1970) c.0-6 as amended (1975).

21. Criminal Justice Act (1925) 15 & 16 Geo.5 c.86 s.47; Snow's Criminal Code of Canada s.18 (7th ed. 1974).

22. The Theft Act (1968) c.60 s.30(2).

23. Supra, Chapter Three s.B4(a).

24. Supra, Chapter Three s.B4(a).

piece-meal reform. Nevertheless, the present Canadian position on the wife's saving from the housekeeping allowance is so abhorrent to equitable principles that there is a case for immediate remedial action.[25]

It is interesting to note the diminishing importance of the presumptions of advancement and resulting trust,[26] for example, where the husband pays money into a joint bank account the presumption of advancement is rebuttable. Both these presumptions are a relic of the time when married women in general were entirely dependent on their husbands for support. With so many earning married women in today's society the underlying basis for these presumptions is no longer valid. However, this is not to say that there are not still cases where the protection afforded by the presumptions serves a useful purpose pending a change in our matrimonial property laws.

Turning to the rights of the wife in the matrimonial home, the question of possession often arises long before matrimonial proceedings are commenced in the courts, and in many cases where no such action is taken. In England the matter appeared to be settled in 1967 by legislation providing that the wife's right to occupy the matrimonial home would be a charge on the husband's estate or interest in the property while the marriage subsisted.[27]

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[25] Supra, Chapter Four s.2(a).

[26] Supra, Chapter Four s.3.

[27] The Matrimonial Homes Act (1967) c.75 s.2 as amended by the Matrimonial Proceedings and Property Act (1970) c.34 s.38.

The wife devoid of proprietary rights was thus given "rights of occupation" which could only be withheld by court order. The implementation of this Act has given rise to difficulties and subsequent case law indicates that a fair element of uncertainty still exists with regard to the wife's right to remain in the matrimonial home.[28] In Canada the western provinces have homestead legislation which prevents a husband who owns the matrimonial home from disposing of it or encumbering it without the wife's consent; the home is exempt from sale on execution and the wife may retain possession on the husband's death. But the married woman in provinces without homestead legislation finds herself in the highly unsatisfactory situation which existed in England prior to the Matrimonial Homes Act of 1968. This was that the wife's right to occupation of the matrimonial home was a purely personal right arising from her right to support and cohabitation, a right by which third parties were not bound.[29] But the Canadian law is by no means certain on this point.[30]

With regard to matrimonial proprietary rights, a rigid adherence to the doctrine of separation of property has proved to be antithetical to the modern concept of marriage as an equal partnership. The growing realization of the right of the married woman to a fair share in the profits of the partnership gave rise to the principle of family assets and the doctrine of the resulting trust was invoked in order to obtain such a share for her in recognition of her contribution in caring for the home and family. But the rigidity of our law - and of the House of Lords - called a halt to such enlightened interpretations of the law and in the case of Pettitt v. Pettitt[31] it was established that the ordinary property principles must be applied in matrimonial property disputes and that the court could not override vested proprietary interests. A wife, therefore, could acquire no interest in property unless her contribution thereto had been of a strictly financial nature. In the subsequent leading case of Gissing v. Gissing[32] the House of Lords frowned upon the use of the maxim "equality is equity" in assessing the extent of a beneficial interest accruing to a non-owning spouse and again, in this case, the House of Lords failed to differentiate between family assets in the sense of acquisition through indirect contributions on the one hand and, on the other, acquisitions through the principle of community of assets.

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[28] Supra, Chapter Five s.2(a).

[29] National Provincial Bank Ltd. v. Ainsworth (1965) A.C. 1175 (H.L.)

[30] Supra, Chapter Five s.2(b).

Arising from Pettitt v. Pettitt legislation was introduced in England to provide for the acquisition of a beneficial interest in matrimonial property where the non-owning spouse substantially contributed to the improvement of the property in money or money's worth. Subsequent to the cases of Pettitt and Gissing the family assets doctrine has gained strength through the continued support of Lord Denning who, with ingenuity, sought to apply as analogous the principles in the Matrimonial Proceedings and Property Act whereby the wife's indirect contribution in the home

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31. (1970) A.C. 777 (H.L.)

32. (1971) A.C. 886 (H.L.)

gained her a beneficial interest in the home in divorce proceedings.[33]

In Canada also a direct, substantial, financial contribution to the purchase of the home was required before a non-owning wife could obtain a beneficial interest therein. The now infamous case of Murdoch v. Murdoch[34] reinforced this principle, declaring that unless there had been an express intent to create a resulting trust in favour of the wife, none arose through substantial indirect contributions. Mr. Justice Laskin (as he then was) unsuccessfully sought to apply the theory of the constructive trust in order to enable the wife obtain an interest. It is hoped that the uncertain state of the law in this regard in Canada will soon be settled, in Alberta at least. The Attorney General of Alberta recently delivered himself of his personal view that wives should have a half interest in the matrimonial home and its contents and that such a right "is so fundamental, it should apply retroactively to all existing marriages".[35] The Attorney-General then indicated that changes to the matrimonial property laws of Alberta would be introduced in the Legislature before the end of 1976.

The various alternatives to a separation of property regime have been the subject of study and report in England and in many Canadian provinces.[36]

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[33] Wachtel v. Wachtel (1973) 1 All E.R. 829.

[34] (1974) 41 D.L.R. (3d) 367.

[35] The Edmonton Journal (February 2, 1976).

[36] Supra, Chapter Five ss. 4(d),(e),(f),(g),(h).

There appears to be general approval, in varying degrees, for the principle of community of property. Only British Columbia however favours full community. England, Ontario, Manitoba and Saskatchewan have singled out the matrimonial home for special treatment recommending co-ownership. That such a step is not warranted while the marriage exists in peace is the view of Alberta, Saskatchewan and Quebec but these provinces agree with Ontario and Manitoba that the home should be equally divided on separation or termination of the marriage when a system of deferred community of property should be brought into play. England favours the use of judicial discretion rather than deferred community as does the Minority Proposal of the Alberta Institute of Law Research and Reform.

Parental rights have undergone considerable change in modern times in that generally the mother now has equal rights with the father whereas formerly the father was the sole arbiter in all family matters.[37] The other vital change in the thinking about children in this Century is that the welfare of the child has now become the paramount consideration:[38] so much so that the actual rights which remain to a parent appear to be fast disappearing. The most important parental right is that of custody. Unfortunately, the term "custody" appears to mean different things to different writers and legislators. Consequently it is not easy to discern the precise position on particular aspects of custody problems. "Custody" is variously used to mean care and control, physical care and control, possession, supervision of the child's upbringing, to give only some of the meanings attributed to the term. Disputes over custody are usually in connection with matrimonial proceedings but otherwise are settled in the lower courts. All conceivable factors deemed pertinent to the child's welfare are considered and whereas formally the moral character of the mother must have been impeccable before custody was granted to her, attitudes have changed so that it is now recognized that even although the mother may have committed adultery she may still be an excellent parent from whom the right of custody should not be withdrawn.[39] Regrettably, Alberta legislation tends to indicate a contrary view on this point in the case of judicial separation [40] or divorce.

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[37] The Guardianship Act (1973) c.29 s.1(1). It will be noted that in Nova Scotia the father's common law right of custody still prevails, supra, Chapter Six n.37.

[38] Guardianship of Infants Act (1925) 15 & 16 Geo.5 c.45 s.1.

The parental right to a child's services seem anachronistic in that it is unthinkable that a parent should seek to enforce it but what is now a fiction still has a use since it provides a parent with a remedy against a stranger who interferes with the right.[41]

It will be noted that Ontario and Saskatchewan have breached the general principle of equal parental rights by making express provision to retain the father's common law authority over the religious faith of the child.[42]

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[39] Supra, Chapter Six n.34.

[40] The Domestic Relations Act R.S.A. (1970) c.113 s.44(1).

[41] Supra, Chapter Six s.3(b).

[42] Supra, Chapter Six s.3(d).

An important reason why parental rights have been diminishing in recent times is the assumption by the State in both England and Canada of the right to protect the child when the State deems the need to have arisen. It may assume the rights in part or *in toto* according to the circumstances.[43] Another obvious reason is the popularity of adoption, since the end of World War I where a complete transfer of all parental rights and duties takes place from the natural parents to the adopting parents.[44] An interesting move is afoot in England, where child welfare law in general is under review, in order to enable a parent relinquish his or her parental rights in favour of an adoption agency rather than in favour of specific adopting parents. There is also a plan for "custodianship orders" which appears to be a half-way measure between adoption and placing a child in care of the local authority; the custodian may be a relative or friend but not a parent.[45]

The basic duty of a parent to maintain a child of the family is also now shared by both parents[46] and there is currently considerable controversy over this duty with regard to a husband or wife who is not the natural parent of a child of the family. Again, child maintenance orders may be sought independently or in the course of matrimonial proceedings when all relevant factors will be taken into consideration.

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[43] *Supra*, Chapter Six ss.4(a)(i), (ii).

[44] See generally *supra*, Chapter Six ss.4(b)(i), (ii).

[45] *Supra*, Chapter Six s.4(b)(i).

[46] Ministry of Social Security Act (1966) c.20 s.22; The Criminal Code R.S.C. (1970) c.34 s.194. See also *supra*, Chapter Six s.5(a)(i).

The duty of the parent to protect the child is contained in many statutes with criminal sanctions; from the prohibiting of the tatooing of children to prohibiting abortion.[47] With regard to parental liability for a child's actions, a parent is generally not liable unless encouragement was given or there was a lack of proper supervision.[48] Concerning a child's contracts also there is no liability on a parent qua parent.

In the matter of a wife's right to matrimonial relief the rather outmoded action for restitution of conjugal rights has been abolished in England but it is still alive in Canada.[49] Canada also still retains the old grounds for judicial separation, such as cruelty with its attendant controversy as to the meaning of "cruelty" in judicial separation as opposed to "cruelty" in divorce. England however has now altered the grounds for judicial separation in order to espouse the more liberal attitudes of today so that the grounds for judicial separation are now the same as for divorce in England. Provision is also made for reconciliation in judicial separation. It must be said, however, that Alberta has updated her legislation on judicial separation in order to provide equality of treatment as between husband and wife.[50]

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47. See generally supra Chapter Six s.5(b).

48. Children and Young Persons Act (1969) s.55.

49. Matrimonial Proceedings and Property Act (1970) c.45 s.20.

50. Domestic Relations Act R.S.A. (1970) c.113 as amended by the Attorney General Statutes Amendment Act (1973) c.61.

Both England and Canada have now accepted the concept of break-down of marriage.[51] In England the overriding consideration must be that the marriage has broken down irretrievably and in that context there are more specific grounds such as adultery, desertion, living apart and it being unreasonable to expect the parties to continue living together (the term "cruelty" has wisely been abandoned). While Canada has introduced the modern concept of permanent breakdown of marriage and delineates various grounds for divorce within that concept, the traditional grounds of the sexual offences and of cruelty still remain outside the concept of marriage breakdown. This is regrettable.

England has also dropped the traditional bars to a divorce petition of collusion and connivance but provision for intervention by The Queen's Proctor presumably serves the same function. A new bar is introduced where a petition is based on living apart for five years. In such a case the petition will be dismissed if grave financial or other hardship would accrue to the respondent if the petition were granted.[52] The traditional bars of collusion, condonation and connivance still operate in Canada; furthermore, a decree will be refused which is based solely upon the consent, admission or default of either or both of the parties.[52a] Condonation and connivance however are but discretionary bars by virtue of the proviso that the court may nevertheless grant the decree if it deems it to be in the public interest to do so. Additional bars in Canada are where reasonable maintenance arrangements for children of the marriage would be prejudiced and where a decree based on marriage breakdown would be unduly harsh or unjust to the respondent.[53]

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[51] Matrimonial Causes Act (1973) c.18; The Divorce Act R.S.C. (1970) c.D-8.

[52] Matrimonial Causes Act (1973) c.18 s.5.

[52a] In *Ewasiuk* v. *Ewasiuk* (1968) 70 D.L.R. (2d) 525 Mr. Justice Morrow, in a North West Territories case, indicated that he was satisfied that sec.9(1)(c) of the Divorce Act was not intended to.be a bar to a judge acting upon admissions presented in for form of sworn testimony in court.

The divorce legislation in both England and Canada makes strenuous efforts in aid of reconciliation but there is considerable scepticism as to the practical value of these provisions. It should be noted that whereas much criticism has been levelled at the new English divorce law on the ground that it enables a husband to discard his wife just because he is tired of her, considerable precautions are built into the legislation in an attempt to ensure that undue hardship does not result.[54]

Fortunately the Law Reform Commission of Canada, in its Working Paper on Divorce, is seeking to promote reformative legislation in order to remove the very considerable fault element which has been retained in Canadian legislation and to try and remove the adversary element which is still very strong in Canadian proceedings.[55]

At the root of all provisions for financial relief is the principle that the family should be self sustaining and not become a burden on the State. In addition to the detailed provisions in England for providing

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53. See generally supra, Chapter Seven s.5(e)(v).

54. Matrimonial Causes Act (1973) c.18 s.10.

55. Supra, Chapter Seven s.7.

either party with appropriate financial relief in terms of money, provisions are also made for transferring or settling property after a decree of divorce, nullity or judicial separation.[56] This has proved a boon to the non-owning wife who, as has been seen, could not otherwise obtain a beneficial interest in the home unless she had made direct financial contributions towards the purchase thereof. Relief is also available where no matrimonial proceedings are involved but where there has been wilful neglect to maintain on the part of either spouse.[57] In assessing the extent of financial relief all the circumstances of the case are taken into account and as a very general guide a sum which will bring the wife up to one-third of the total joint income of both husband and wife is considered reasonable.

The question of financial relief is dealt with in a similar fashion in Canada[58] but again Alberta stands out from other provinces in making provisions that apply equally to husband and wife in areas subject to provincial legislation. In connection with the Canadian Divorce Act the financial provisions do not discriminate against either spouse so that, as in England, a wife may be ordered to provide support for her husband but circumstances where such action would be appropriate are rare.

At last questions are being asked as to what should be the nature of maintenance in society today: should it be the minimum sum required for

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56. Matrimonial Causes Act (1973) c.18 s.24(1).

57. Id. s.27.

58. Supra, Chapter Eight s.2.

existence?; should it be an equal partner's share on the dissolution of a partnership?; should it be a reward for years of faithful service or reflect a punishment for conduct deemed wrong by a particular court? The wording of the relevant statutory provisions is such that they can accommodate any of these views.

The final division of property on death is basically similar in England and Canada.[59] On intestacy the share of the surviving spouse in the residue after her share has been extracted depends on what other relatives are alive at the date of death. However in Alberta, Manitoba and Saskatchewan a widow only need share the residue with children of the marriage; if there are no children the widow takes all. The need to make a will is thus not so important in these provinces. In the remaining provinces, and also in England, after the widow has received her individual share the residue is shared by her with parents and siblings in the absence of issue.

In both England and Canada there exist Family Provision Acts in order to rectify any unjust provision, or lack of provision, for dependants in the will of the deceased. But considerable dissatisfaction exists with the law regarding testate succession both in England and Canada. Part of this dissatisfaction results from provisions aimed at protecting the widow's right to remain in the matrimonial home which, while reasonable in theory, do not in practice afford the protection which was intended. Again, the whole nature of the survivor's entitlement is now under scrutiny. In cases where the Family Provision Acts are invoked, the question is asked;

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[59] *Supra*, Chapter Nine ss.2, 3.

should the widow's share be enough to keep her at mere subsistence level or has she a right to demand something more substantial? The arguments here are rather similar to those being put forward in connection with maintenance.[60] Proposals for reform in this area were inevitable as a part of the general agitation for matrimonial property reform in order to accord to the wife a fair share of the family assets in recognition of her valuable work in caring for home and family. The only viable mechanisms appear to be the continued use of judicial discretion or an entitlement in law to a fixed share. The solution chosen by any country or province will inevitably be that which accords with the matrimonial property regime which it advocates. Thus England favours judicial discretion because it believes that this method will be the most effective when used in conjunction with its general scheme for reforming matrimonial property law.[61]

Canadian Provinces, having gone a different route from England on property rights while the spouses are alive, may well eventually arrive at differing solutions concerning property rights on death. In Alberta, the Institute of Law Research and Reform has declared its support for deferred sharing on the death of either spouse, premised on equal sharing.[62] This logically follows from the Institute's proposals concerning the division of property during the lifetime of the spouses. But there logic ends, for it is proposed that while the survivor be entitled to share with the estate where the estate has more than the deceased's proper share of the shareable gains of the marriage, it is proposed that the reverse situation should not obtain.[63]

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[60] Supra, Chapter Nine s.4.

[61] The Law Commission, First Report on Family Property: A New Approach (1973).

[62] Report No. 18: Matrimonial Property (1975).

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[63] The Law Reform Commission of Ontario recommends that the balancing payment be made regardless of whether the survivor or the deceased had more than his or her share.

B. SUMMARY OF SUGGESTIONS

The following proposals for reform have arisen out of this study:

1. Statutory provision should be made to enable a married woman elect as to her surname, either on, during or after marriage.
2. A married woman's passport should not cease to be valid upon marriage where she chooses to retain her maiden name; and in the event that she adopts her husband's name, a mere endorsation of the passport should be all that is required.
3. The Federal Government should be urged to fulfill its promises in the near future in order that:
    a) There should be an automatic resumption of Canadian citizenship by women who lost it on marriage prior to January 1, 1947;
    b) Where the nationality of parents differs, the child, natural or adopted, should inherit dual nationality thus giving equal emphasis to the ethnic character of both;
    c) Either parent should be enabled to apply for naturalized citizenship for its child;
    d) The Indian Act should be amended to enable the Indian woman who marries a non-Indian to retain her Indian status.
4. In view of the desirability of national uniformity in the matter of a married woman's domicile, and in view of the Federal Parliament's authority to legislate on matters of marriage and divorce, the Federal Parliament should legislate an end to the concept of the wife's dependent domicile by providing that the domicile of a married woman shall no longer be that of her husband solely by virtue of the marriage.

5. The deserted wife's agency of necessity should be abolished in Canada as being outmoded and unnecessary in today's society.
6. The relevant sections of the provincial Married Women's Property Acts should be repealed in order that legislation be enacted to enable husband and wife sue each other in tort but with a discretionary power in the court to stay action where it appeared that no substantial benefit would accrue to either party from continuing proceedings.
7. In cases where wilful or negligent misconduct has led to the loss of consortium, there should be instituted generally a statutory right to damages at the suit of either spouse.
8. Where a province wishes to retain actions for enticement they should be available to the wife as well as the husband. Actions for harbouring should be abolished entirely as being anachronistic.
9. The action for damages in the case of adultery should be abolished on the ground that it is quite impractical as well as being outmoded.
10. Welfare benefits should not be withdrawn from recipients whose private lives do not conform to the moral standards of the legislative or administrative bodies concerned.
11. An action for non-support against a deserting father should not be deemed a prerequisite to the obtaining of financial relief by the deserted wife.
12. Each Provincial Legislature should urge the Federal Government to give priority to a matter presently under consideration; that Canadan Pension Plan legislation be amended in order that provisions applicable to the wife and children of a male contributor be made applicable to the husband and children of a female contributor.

13. Pending the introduction of a matrimonial property regime, the Province of Canada should be urged to introduce immediately remedial legislation to the effect that where either spouse being in receipt of a housekeeping allowance effects savings thereout, such savings, or property acquired therewith, should belong to the husband and wife in equal shares.

14. Pending the introduction of a matrimonial property regime, those provinces without homestead legislation should introduce legislation to provide a non-owning spouse with rights of occupation in the matrimonial home.

15. A system of deferred community overlayed with a judicial discretion mechanism should be adopted by all Canadian common law provinces and co-ownership of the matrimonial home should not be attempted at this time. The deferred community system would apply only to assets acquired during the marriage, with the exception of property acquired by gift or inheritance, and whereas there would be provision that the residuary estate of husband and wife be totalled and divided equally, there would lie an appeal to the court to vary this proportion where it would be unjust to hold that equality was equity.

Furthermore, despite the autonomy of the individual provinces in property matters, and because the property system chosen by each province will inevitably have repercussions upon other areas coming within the purview of the federal government, such as divorce and taxes, serious consideration should be given by each common law province to entering upon joint deliberations with a view to agreeing upon a basic single system of property reform in the interests of consistency, conformity and efficient administration.

16. Actions by a parent against a third party for loss of a child's services should be abolished and replaced by an action to recover expenses reasonably and honestly incurred as a result of injury inflicted upon a dependent child.

17. In matters of child custody the absolute priority presently given to the welfare of the child should be reconsidered in order to place more emphasis on the fast-diminishing parental rights.

18. Pending reform in divorce legislation in Canada, grounds for judicial separation in Alberta should be brought into line with those for divorce by introducing as additional grounds those circumstances provided for under Section 4(1) of the Canadian Divorce Act.

19. Canada should introduce reformative divorce legislation which would dispense with the traditional matrimonial offences so that permanent breakdown of marriage would be the overriding criterion.

20. The term "maintenance" should be statutorily defined in order to preclude the situation where courts are left to interpret statutory provisions in the light of their own philosophical attitudes.

21. Contrary to the recommendations of the Alberta Institute of Law Research and Reform, in the event that a system of deferred sharing is adopted during the lives of the parties, the shareable gains should be distributed in the same manner on the death of either spouse as on dissolution of marriage.

ABBREVIATIONS

The following abbreviations have been used in the thesis for The Legal Status of Married Women in England and Canada.

A. ENGLISH LAW

A.C.	Appeal Cases
Ad. & El	Adolphus and Ellis 1834-1840
All E.R.	All England Law Reports
Atk.	Atkyns' Reports 1736-1754
Beav.	Beavan's Reports, Rolls Court 1838-1866
C. & P.	Carrington and Payne's Reports, Nisi Prius
Ch.D.	Law Reports, Chancery Division
Cl. & Fin.	Clark and Finnelly's Reports 1831-1846
Comb.	Comberbach's Reports 1685-1698
Co.Litt.	Coke on Littleton
Cox C.C.	Cox's Criminal Law Cases 1843-1945
Cox Eq.	Cox's Equity Cases 1745-1797
Cr.App.R.	Criminal Appeal Reports
De G.	De Gex's Reports 1844-1848
Dowl.	Dowling's Practice Reports 1830-1841
E.R.	English Reports
H.L. Cas.	Clerk's Reports, House of Lords
Hale P.C.	Hale, Pleas of the Crown
John.	Johnson's Reports 1858-1866

ABBREVIATIONS (Cont....)

J.P.	Justice of the Peace and Local Government Review
K. & J.	Kay and Johnson's Reports 1854-1858
K.B.	Law Reports, Kings Bench Division
Le. & Ca.	Leigh and Cave's Crown Cases 1861-1865
L.J.	Law Journal Newspaper
L.J.Ch.	Law Journal, Chancery.
L.R.P.C.	Law Reports, Privy Council
L.R. P. & D.	Law Reports, Probate and Divorce
M. & Gr.	Manning and Granger Reports 1845-1856
M. & W.	Meeson and Welsby's Reports 1836-1847
Madd.	Maddock's Reports 1815-1822
Mer.	Merivale's Reports 1815-1817
My. & Cr.	Mylne and Craig's Reports 1835-1841
P.	Law Reports, Probate, Divorce and Admiralty Division
P.D.	Law Reports, Probate, Divorce and Admiralty Division
P. Wms.	Peer Williams' Reports 1695-1735
Q.B.D.	Law Reports, Queens Bench Division
S.L.T.	Scots Law Times
State Tr.	State Trials
Str.	Strange's Reports
Term Rep.	Durnford and East's Term Reports 1785-1800
T.L.R.	Times Law Reports
Ves.(Jun.)	Vesey Junior's Reports 1789-1817
W.Bl.	W. Black Reports
W.L.R.	Weekly Law Reports
W.N.	Law Reports, Weekly Notes
W.R.	Weekly Reporter

ABBREVIATIONS (Cont....)

B. CANADIAN LAW

Alta. L.R.	Alberta Law Reports
C.C.C.	Canadian Criminal Cases
D.L.R.	Dominion Law Reports
Man. R.	Manitoba Reports
M.P.R.	Maritime Provinces Report
O.R.	Ontario Reports
O.W.N.	Ontario Weekly Notes
R.F.L.	Reports of Family Law
S.C.R.	Canadian Supreme Court Reports
W.W.R.	Western Weekly Reports

C. AMERICAN LAW

Md.	Maryland Reports

D. AUSTRALIAN LAW

C.L.R.	Commonwealth Law Reports

E. MISCELLANEOUS REFERENCES

Alta. L.R.	Alberta Law Review
Am.Bar.Ass.	American Bar Association
Am.J.Comp.L.	American Journal of Comparative Law
App.Cas.	Law Reports, Appeal Cases
Aust.L.J.	Australian Law Journal
Camb.L.J.	Cambridge Law Journal
Can.Bar.Rev.	Canadian Bar Review
Can.Jur.	Canadian Jurisprudence
Chitty's L.J.	Chitty's Law Journal

ABBREVIATIONS (Cont....)

Conn.L.Rev.	Connecticut Law Review
Fam. Law	Family Law
Fam. L.Q.	Family Law Quarterly
J.Fam.Law	Journal of Family Law
J.Cr.L.	Journal of Criminal Law and Criminology
J.S.P.T.L.	Journal of the Society of Public Teachers of Law
L.J.	Law Journal
L.Q.R.	Law Quarterly Review
L.R.C.P.	Law Reports, Common Pleas
L.T. Journal	Law Times Newspaper
McGill L.J.	McGill Law Journal
M.L.R.	Modern Law Review
N.L.J.	New Law Journal
N.Y.S.	New York Supplement
Osgoode L.J.	Osgoode Hall Law Journal
Ottawa L.Rev.	Ottawa Law Review
S.L.T.	Scots Law Times
Sol.	Solicitor
Sol. J.	Solicitors' Journal
Tul.L.Rev.	Tulane Law Review
U.B.C. Law Rev.	University of British Columbia Law Review
U.Mich. J.L. Reform	University of Michigan Journal of Law Reform
U.N.B.L.J.	University of New Brunswick Law Journal
U.T.L.J.	University of Toronto Law Journal
Women Lawyers' J.	Women Lawyers' Journal

ABBREVIATIONS (Cont.....)

F. COURTS

B.C.S.C.	British Columbia Supreme Court
C.A.	Court of Appeal
C.C.A.	Court of Criminal Appeal
Fam.	High Court, Family Division
H.L.	House of Lords
Ont.C.A.	Ontario Court of Appeal
Sask.S.C.	Saskatchewan Supreme Court
Sh.Ct.	Sheriff Court
S.C.	Supreme Court

G. STATUTES

R.S.C.	Revised Statutes of Canada
R.S.A.	Revised Statutes of Alberta
R.S.B.C.	Revised Statutes of British Columbia
R.S.M.	Revised Statutes of Manitoba
R.S.N.B.	Revised Statutes of New Brunswick
R.S.Nfld.	Revised Statutes of Newfoundland
R.S.N.S.	Revised Statutes of Nova Scotia
R.S.O.	Revised Statutes of Ontario
R.S.P.E.I.	Revised Statutes of Prince Edward Island
R.S.S.	Revised Statutes of Saskatchewan

BIBLIOGRAPHY

Advisory Council on the Status of Women What's Been Done. Ottawa: 1974.

Alberta Institute of Law Research and Reform Matrimonial Property: Working Paper University of Alberta, 1974.

Alberta Institute of Law Research and Reform Matrimonial Property Report No. 18. 1975.

Alberta Institute of Law Research and Reform Matrimonial Support: Working Paper University of Alberta, 1974.

Alexander, E.R. Tort Liability of Children and Their Parents in Mendes da Costa (Ed.) 2 Studies in Canadian Family Law. 1972.

Angers Digest of Canadian Law (19th ed.) Toronto: Canada Law Book Coy., 1967.

Auld, C. Matrimonial Property Law in the Common Law Provinces of Canada in Friedman (Ed.) Matrimonial Property Law. 1975.

Bale, G. Limitation on Testamentary Disposition in Canada (1964) 42 Can.Bar.Rev.

Barlow, A.C.H. Gifts and Other Transfers Inter Vivos and the Matrimonial Home in Graveson and Crane (Ed.) A Century of Family Law. 1957.

Bartholomew, A. Domicil of Married Women (1958) 31 Aust.L.J.

Barton, J.L. The Enforcement of Financial Provision in Graveson and Crane (Ed.) Century of Family Law. 1957.

Baty, T. The Nationality of a Married Woman at Common Law (1936) 52 L.Q.R.

Bevan, H.K. The Law Relating to Children. London: Butterworths, 1973.

Blackstone, Commentaries. (Tucker ed.) Philadelphia: Young, Birch and Small, 1803.

Bliss, M. Canadian History in Documents 1763-1966, Toronto: Ryerson Press, 1966.

Bowker, W. Cases on the Law of Wills. University of Alberta, 1969.

Bowker, W. Reform of the Law of Dower in Alberta. (1955-61) Alta.L.R.

Bowker, W. Succession to Property in the Common Law Provinces. (1958) Can.Jur.

Bromley, P.M. Family Law. (3rd ed.) London: Butterworth, 1966.
(4th ed.) London: Butterworth, 1971.

Bromley, P. *"Living Apart" in the Law of Divorce* (1972) 88 L.Q.R.

Brown, A. *The Married Women's Property Acts 1870, 1874, 1882 & 1884.* (6th ed.) London: Stevens and Haynes, 1891.

Brown, L.B.

Brown, M. *English Law in Search of a Matrimonial Regime* (1970-71) 4 Ottawa L.Rev.

Brown, M. *Married Women and Tortfeasors* (1936) 14 Can.Bar.Rev.

Bysiewicz and MacDonnell, *Married Women's Surnames* (1973) 5 Conn.L.Rev.

Canada Law Reform Commission *Family Property: Working Paper 8* 1975.

Canada Pension Plan (1970) Gov.Doc.H. 21-3770.

Central Office of Information *Social Security in Britain* 1970.

Chapman *The Law and You* 1970.

Cheshire and Fifoot *Law of Contract* (6th ed.) London: Butterworth, 1973.

Chitty, J. *Chitty on Contracts* (22nd ed.) London: Sweet and Maxwell, 1961.

Coke, E. *Coke on Littleton*: Nutt and Gosling, 1738.

Conservative Political Center, *Fair Shares for the Fair Sex*. London, 1969.

Cretney, S. *Excluding Husband from Home* (1971) 121 N.L.J.

Cretney, S. *The Matrimonial Home After Wachtel* (1974) 118 Sol.J.

Cretney, S. *Looking After the Children: Recent Developments* (1972) 116 Sol.J.

Cretney, S. *The Maintenance Quagmire* (1970) 33 M.L.R.

Cullity, M.C. *Property Rights During Marriage* in Mendes da Costa (Ed.) 1 Studies in Canadian Family Law 1972.

Daun *The Right of Married Women to Assert their own Surnames* (1974) 8 U.Mich.J.L. Reform.

Davies, C.E.P. *Matrimonial Relief in English Law* in Graveson and Crane (Ed.) A Century of Family Law 1957.

Davies, C. *Duress and Nullity of Marriage* (1972) 88 L.Q.R.

Dialogus de Scaccario.

Dicey, A.V. Dicey's Conflict of Laws (7th ed. Morris) London: Stevens, 1958.

Dicey, A.V. Law and Public Opinion in England. (2d ed.) London: Macmillan, 1974.

Downey Research Associates Ltd., Matrimonial Property in Alberta: Facts and Attitudes 1974.

Earnshaw, T.K. Presumption of Advancement (1971) 121 N.L.J.

Eekelaar, J.M. What are Parental Rights (1973) 89 L.Q.R.

Eekelaar, J.M. Deprivation of Parental Rights: Legislative Contrasts in England, Wales, Australia and Canada (1973) 4 Fam.L.Q.

Eekelaar, J.M. Family Law (1972) A.S.C.L.

Ellis The Advancement of an Intended Wife (1975) 119 Sol.J.

Fodden, S. Family and Welfare Assistance Legislation in Canada in 2 Studies in Canadian Family Law 1972.

Fraser, F.M. Children in Need of Protection in Mendes da Costa (Ed.) 1 Studies in Canadian Family Law 1972.

Fridman, G.H.L. Consortium as an Interest in the Law of Torts (1974) Can.Bar.Rev.

Fridman, G.H.L. The Law of Agency (3d ed.) London: Butterworths, 1971.

Friedman, W. (Ed.) Matrimonial Property Law. Toronto: Carswell, 1955.

Ginsberg, P. The Status of Women (1972) 20 Am.J.Comp.L.

Glendon, M.A. Matrimonial Property: A comparative Study of Law and Social Change (1974) 49 Tul.L.Rev.

Gold, J. Freedom of Testation: The Inheritance (Family Provision) Act (1938) 1 M.L.R.

Graveson and Crane (Ed.) Century of Family Law. London: Sweet and Maxwell, 1957.

Graveson, R.H. The Conflict of Laws (2d ed.) London: Sweet and Maxwell, 1957.

Graveson, R.H. Reform of the Law of Domicile (1954) 70 L.Q.R.

Guest, A. Family Provision and the Legitima Portio (1957) 73 L.Q.R.

Hahlo, H.R. Matrimonial Property Regime: Yesterday, Today and Tomorrow (1973) 11 Osgoode L.J.

Hahlo, H.R. Nullity of Marriage in Mendes da Costa (Ed.) 2 Studies in Canadian Family Law 1972.

Hall, J.C. The Waning of Parental Rights (1972) 31 Camb.L.J.

Halsbury, H. Halsbury's Laws (3d ed Simonds) London: Butterworths, 1957.

Health and Social Security Department. Strategy for Pensions 1971.

Hoggett, B.M. Family Crises and the Problem of Accommodation (1974) 118 Sol.J.

Hughes, M.E. Adoption in Canada in Mendes da Costa (Ed.) 1 Studies in Family Law 1972.

Hume Anger's Digest of Canadian Law 1967.

Inker, M.L. Expanding the Rights of Child in Custody and Adoption Cases (1971) 5 Fam.L.Q.

Jacobsen Murdoch v. Murdoch: Just About What the Ordinary Rancher's Wife Does (1974) 20 McGill L.J.

James, T.E. The English Law of Marriage in Graveson and Crane (Ed.) A Century of Family Law 1957.

James, T. The Legal Guardianship of Infants (1966) 82 L.Q.R.

Jenks, E. A Short History of English Law. (2d ed.) London: Methuen, 1920.

Johnson, E. Family Law (2d ed.) London: Sweet and Maxwell, 1965.

Jordan, F. The Constitution and Ancilliary Relief under the Divorce Act (1969) 27 The Advocate.

Josling, J. Change of Name (9th ed.) London: Oyez Publications, 1970.

Kahn-Freund, O. Inconsistencies and Injustices in the Law of Husband and Wife (1952) 15 M.L.R.

Kahn-Freund, O. Law Reform (Husband and Wife) Act 1962 25 M.L.R.

Kahn-Freund, O. Matrimonial Property - Some Recent Developments (1959) 22 M.L.R.

Kahn-Freund, O. Law Commission: Published Working Paper No. 42: Family Property Law 1971 35 M.L.R.

Kahn-Freund, O. Recent Legislation on Matrimonial Property (1970) 33 M.L.R.

Kahn-Freund, O. Once Again - The Matrimonial Home (1955) 18 M.L.R.

Kanowitz, L. Women and The Law: The Unfinished Revolution (2d ed.) Albuquerque: University of New Mexico Press, 1970.

Kanowitz, L. Sex Roles in Law and Society. Albuquerque: University of New Mexico Press, 1973.

Kenyon, D. Some Problems in the Nationality of Married Women (1947-48) 33-34 Women Lawyers' J.

Khetarpal, S.P. Property Rights of Husband and Wife: A Brief Survey (1969) Alta. Law. Rev.

Khetarpal, S.P. Family Law (1975) 7 Ottawa Law Rev.

Khetarpal, S.P. Alimony and Maintenance in Domestic Relations Casebook University of Alberta, 1975.

Kitchin, S.B. A History of Divorce Cape Town: Juta, 1912.

Kleinfeld, V. The Balance of Power Among Infants, Their Parents and the State (1970) 4 Fam.L.Q.

Labour Canada. Women's Bureau '73 1974.

Labour Canada. Women's Bureau: Women in the Labour Force 1971.

Laskin, B. Laskin's Canadian Constitutional Law (4th ed.) Toronto: Carswell, 1973.

Laskin, B. Dependent's Relief Legislation (1939) 17 Can.Bar.Rev.

Lasok, D. Working Wife's Share in the Matrimonial Home (1969) 19 N.L.J.

Law Commission First Annual Report 1965-66 1966.

Law Commission Report on Jurisdiction in Matrimonial Causes (1972) Law Comm. No. 48.

Law Commission Law Reform Committee 9th Report (1961) Cmnd.1268.

Law Commission First Report on Family Property: A New Approach Law Com. No. 52 1973.

Law Commission First Report on Family Property: A New Approach 1973.

Law Reform Commission of Canada Working Paper on Divorce: No.13 1975.

Law Reform Commission of Canada Maintenance on Divorce (Working Paper 12) 1975.

Lesser, H. The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot (1973) 23 U.T.L.J.

MacDonald and Ferrier Canadian Divorce Law and Practice Toronto: Carswell, 1975.

MacDougall, D.J. Alimony and Maintenance in Mendes da Costa (Ed.) 1 Studies in Canadian Family Law 1972.

Marsh The Wife's Interest in the Consortium (1967) 67 L.Q.R.

Master, M.K. Report of Research in Canadian Family Law. 1970.

Megarry, R.E. The Deserted Wife's Right to Occupy the Matrimonial Home (1952) 68 L.Q.R.

Mendes da Costa, D. Studies in Canadian Family Law. Toronto: Butterworths, 1972.

Mendes da Costa, D. Husband and Wife in the Law of Torts in Studies in Canadian Family Law (2d ed.) 1972.

Mendes da Coasta, D. Divorce and the Conflict of Laws in 2 Studies in Family Law 1972.

Miller, G. Family Assets (1970) 86 L.Q.R.

Millet, K. Sexual Politics. New York: Doubleday & Co., 1970.

Mills, J. The Subjection of Women (2d ed.) London: Langmans, 1869.

Montmorency The Changing Status of Married Women (1897) 13 L.Q.R.

Munro Status of Women in Canada 1973 1973.

Nance, D. Interpreting Matrimonial Homes Act 1967 (1967) 117 N.L.J.

Nance, D. Spouse's Occupation (1969) 119 N.L.J.

National Trust Coy. Ltd. A Study of Canadian Pension Plans (3d ed.) Toronto, 1969.

New Brunswick Human Rights Commission Women and the Law in New Brunswick 1973.

New Brunswick Human Rights Commission Basic United Nations' Human Rights Documents 1973.

Ontario Law Reform Commission The Age of Majority and Related Matters 1969.

Ontario Law Reform Commission Report on Family Law, Part III Children 1973.

Ontario Law Reform Commission Report on Family Property Law 1974.

Ontario Law Reform Commission Property Subjects 1967.

Ontario Law Reform Commission Report on Family Law, Part I Torts 1969.

Ontario Law Reform Commission Separation and Divorce Support Obligations 1969.

Ontario Law Reform Commission Torts 1969.

Payne, J. Right of Marital Consortium 8 J.Fam.Law.

Payne, J. The Divorce Act (Canada) 1968 (1969) 17 Chitty's L.J.

Perkins, R.M. Criminal Law. Mineola: N.Y. Foundation Press, 1957.

Pettit, P.H. Parental Control and Guardianship in Graveson and Crane (Ed.) Century of English Law 1957.

Pollock and Maitland History of English Law (2d ed.) Cambridge: University Press, 1968.

Potter An Historical Introduction to English Law and its Institutions (2d ed.) London: Sweet & Maxwell, 1943.

Power, W. The Law of Divorce in Canada. Calgary: Burroughs, 1948.

Puxon, M. Death of a Fiction (1962) 106 Sol.J.

Puxon, M. The Family and the Law, London: MacGibbon & Kee, 1967.

Reville, R.W. The Divorce Act Annotated. Ontario: Canada Law Book Ltd., 1973.

Robinson, L.R. Custody & Access in Mendes da Costa (Ed.) 2 Studies in Canadian Family Law 1972.

Rose, P.L. Matrimonial Homes Act 1967 (1967) 117 (2d) N.L.J.

Rothschild The Right to Change One's Name (1965) 5 J.Fam.L.

Royal Commission Report on the Status of Women in Canada 1970.

Royal Commission Report of Royal Commission on Marriage and Divorce 1955.

Salmond, J.N. Salmond on Torts (16th ed.) London: Sweet & Maxwell 1973.

Samuels, A. A Duty to Maintain of Assuming Step-father (1962) 26 M.L.R.

Samuels, A. Financial and Proprietary Provisions (1975) 5 Fam.L.

Samuels, A. The Married Women's Property Act 1964 (1964) 108 Sol.J.

Samuels, A. The Joint Matrimonial Banking Account and its Proceeds (1965) 28 M.L.R.

Samuels, A. The Matrimonial Homes Act 1967 (1967) 111 Sol.J.

Saskatchewan Law Reform Commission First Mini-Working Paper 1974.

Saskatchewan Law Reform Commission Second Mini-Working Paper 1974.

Saskatchewan Law Reform Commission Third Mini-Working Paper 1974.

Schmitthoff, C. Nationality of Married Women (1946) 13 Sol.

Scott, A.W. Trusts (3d) Boston: Little, Brown & Co., 1967.

Snell, E.H.T. Snell's Principles of Equity (27 ed. Megarry & Baker) London: Sweet & Maxwell, 1973.

Snow, A. "Child of the Family", Liability to Maintain and Supplementary Benefits (1975) 5 Fam.L.

Sopinka, J. The Divorce Act, 1968, Collusion Confined (1969) Can.Bar.Rev.

Spencer A Woman's Right to her Name (1973/74) 21 U.C.L.A.Law Rev.

Stannard, V. Married Women v. Husbands' Names. San Francisco: Germain Books, 1973.

Stinson, H. The Unsoundness of the Domiciliary Theory (1956) 42 Am.Bar Ass.J.

Stone, O. Nationality of Married Women (1946) 13 Sol.

Stone, O. Report on Committees (1961) 24 M.L.R.

Stone, O. Married Women's Property Act 1964 (1964) 27 M.L.R.

Stone, O. Statutes (1968) 31 M.L.R.

Stone, O. Recent Developments in the Law of Adoption and Long-term Fostering in the United Kingdom University of Berlin, 1975.

Stone, O. The Economic Aspects of Death in the Family (1966) 8 J.J.P.T.L.

Swan, J. A New Approach to Marriage and Divorce in the Conflict of Law (1974) 24 U.T.L.J.

Tamaki, G.T. The Canadian Citizenship Act 1946 (1947) 7 U.T.L.J.

Todd and Jones Matrimonial Property (1972) H.M.S.O. #BN 11 7001295.

Tomlin Committee Report on Adoption 1925 Cmnd. 2401.

Treatise of Feme Coverts: Or, The Lady's Law. New Jersey: Rothman Reprints Inc., 1914.

Turner-Samuels, M. The Law of Married Women. Ipswich: Thames Bank Pub., 1957.

Tyler, E. Family Provision. London: Butterworths, 1971.

United Nations Commission on Status of Women Legal Status of Married Women 1955.

United Nations Department of Economic and Social Affairs Nationality of Married Women 1963.

United Nations General Assembly Resolutions 503D(xvi) 547 I(xviii), (1957).

Victoria Statute ~~Law~~ Revision Committee Report on Actions Between Husband and Wife 2046/66.

Webb, S. and B. English Local Government: English Poor Law History. London, 1927.

Williams, G. Legal Unity of Husband and Wife (1947) 10 M.L.R.

Williams, C. Husband's Laibility for his Wife's Torts (1900) 16 L.Q.R.

Williams, G. Some Reforms in the Law of Tort (1961) 24 M.L.R.

Willis, H.P. The Nature of a Joint Account (1936) 14 Can.Bar.Rev.

Winfield, P.H. *Textbook of the Law of Tort* (6th ed.) London: Sweet & Maxwell, 1954.

Winfield, P.H. *Winfield on Torts* (2d ed.) London: Sweet & Maxwell, 1943.

Winfield, P.H. *Recent Legislation on the English Law of Tort* (1936) 14 Can.Bar.Rev.

Winfield and Jolowicz *Tort* (9th ed.) London: Sweet & Maxwell, 1971.

Women's Cultural and Information Bureau *Laws of Interest to Women in Alberta* 1968.

Wooton, A.F. *Judicial Discretion in the Division of Matrimonial Assets* (1959-63) 1 U.B.C. Law Rev.

Wooton, A.F. *Some Recent Developments in the Law of Matrimonial Property* (1972) 10 Alta.L.R.

World Peace Through Law Center *The Law and Woman* 1975.

LIST OF CASES

A. v. *A.* (1905) Man. R. 483.

Allan v. *Allan* (1971) 25 D.L.R. (3d) 253.

Ambrose v. *Ambrose* (1962) 14 D.L.R. (2d) 438.

Anderson v. *Anderson* (1972) 29 D.L.R. (3d) 587.

Applebaum v. *Gilchrist* (1964) 4 D.L.R. 383 (Ont. C.A.).

Armstrong v. *Armstrong* (1971) 3 O.R. 544.

Arsenault v. *Bishop* (1931) 2 D.L.R. 325.

Atamanchuk v. *Atamanchuk* (1955) 15 W.W.R. 301 affd. 21 W.W.R. 335 (C.A.).

Attorney General of Canada v. *Lavell* (1974) 38 D.L.R. (3d) 481.

Attwood v. *Attwood* (1968) P. 591, 595.

Baker v. *Baker* (1972) 5 R.F.L. 358.

Balfour v. *Balfour* (1919) 2 K.B. 578.

Bank of Montreal v. *Stuart* (1911) A.C. 120 (P.C.).

Banks v. *Done* (1934) 1 D.L.R. 789.

Barker v. *Westminister Trust Co*. (1941) 3 W.W.R. 473.

Barnet v. *Howard* (1900) 2 Q.B. 784.

Barrack v. *McCulloch* (1856) 3 K. & J. 110.

Bashall v. *Bashall* (1894) 11 T.L.R. 152 (C.A.).

Bassett v. *Bassett* (1974) reported in (1975) 5 Fam. Law 90.

Bateman v. *Bateman* (1964) 45 D.L.R. (2d) 266 at 273 (Alta. S.C.).

Bayliss v. *Blackwell* (1952) 1 K.B. 154.

Bazeley v. *Forder* (1968) L.R. 3 Q.B. 559.

Beetham v. *James* (1937) 1 K.B. 527.

Bennett v. *Bennett* (1951) 2 K.B. 572.

Bertram v. *Bertram* (1974) 41 D.L.R. (3d) 107.

Biberfield v. *Berens* (1952) 2 All E.R. 237.

Bigelow v. *Bigelow* (1972) 22 D.L.R. (3d) 729.

Birkett v. *Birkett* (1908) L.T. 540.

Re Bishop, National Provincial Bank Ltd. v. *Bishop* (1965) Ch. 450.

Re Blake, Blake v. *Power* (1889) 60 L.T. 663.

Blyth v. *Blyth* (1966) 2 W.L.R. 364 (H.L.).

Bogdane v. *Bogdane* (1974) 38 D.L.R. (3d) 767.

Boston v. *Boston* (1904) 1 K.B. 124.

Boultbee v. *Boultbee* (1972) 4 R.F.L. 237 (B.C.).

Boyt v. *Boyt* (1948) 2 All E.R. 436.

Brandon v. *Robinson* (1811) 18 Ves. 434.

Re Breton's Estate, Breton b. *Woolven* (1881) 17 Ch. 416.

Brinnen v. *Brinnen* (1972) 28 D.L.R. (3d) 110.

Brooks v. *Blount* (1923) 1 K.B. 257.

Broom v. *Morgan* (1953) 1 Q.B. 597.

Brown v. *Brown* (1971) 15 D.L.R. (3d) 382.

Brown v. *Brown* (1974) (C.A.) reported in 119 Sol. J. 166.

Burdett v. *Horn* (1911) 28 T.L.R. 83.

Burke v. *Burke* (1973) (C.A.) reported in 118 Sol. J. 98.

Burt v. *Burt* (1972) 24 D.L.R. (3d) 497.

Burton v. *Burton* (1972) 8 R.F.L. 272.

Butler v. *Butler* (1885) 14 Q.B.D. 831.

C (A) (an infant), C v. *C.* (1970) 1 All E.R. 309.

Calder v. *Calder* (1971) 16 D.L.R. (3d) 369 at 374 (Ont.).

Callot v. *Nash* (1923) 39 T.L.R. 291.

Campion v. *Cotton* (1812) 17 Ves. 263.

Carnegie v. *Carnegie* (1874) 31 L.T. 7.

Carvell v. *Carvell* (1969) 2 O.R. 513.

Chant v. *Read* (1939) 2 K.B. 346.

Chapman v. *Chapman* (1969) 3 All E.R. 476 (C.A.).

Cherewick v. *Cherewick* (1969) 69 W.W.R. 235.

Cherniski v. *Cherniski* (1971) 16 D.L.R. (3d) 606.

Chipchase v. *Chipchase* (1939) 3 All E.R. 895.

Churchman v. *Churchman* (1945) P. 44.

Clarke v. *Clarke* (1971) 4 R.F.L. 309.

Clayton v. *Adams* (1796) 6 Term Rep. 604.

Collins v. *Long* (1901) 17 T.L.R. 242.

Compton v. *Compton* (1970) 1 N.S.R. (2d) 827.

Cooper v. *Crane* (1891) P.369.

Cooper v. *MacDonald* (1877) 7 Ch. D.288.

Countess of Strathmore v. *Bowes* (1789) 1 Ves. Jun.22.

Cousins v. *Sun Life Assurance Soc.* (1933) 1 Ch. 126 (C.A.).

Cowley v. *Cowley* (1901) A.C. 450.

Cridge v. *Cridge* (1973) 12 R.F.L. 348.

Croft v. *Croft* (1969) 10 D.L.R. (3d) 267.

Crossley v. *Crossley* (1953) 1 All E.R. 891.

Csicsiri v. *Csicsiri* (1973) 13 R.F.L. 263 (Alta.).

Cuenod v. *Leslie* (1909) 1 K.B. 880.

Cupel v. *Powell* (1864) 17 C.B. (N.S.) 748.

D. v. *D.* (1973) 36 D.L.R. (3d) 17 (Ont.).

Dancer v. *Dancer* (1949) P.147.

Daudrich v. *Daudrich* (1971) 14 D.L.R. (3d) 245.

Davies v. *Davies* (1969) 3 D.L.R. (3d) 381.

Dean v. *Peel* (1804) 5 East 45.

Debenham v. *Mellon* (1880) 6 A.C. 24.

Deol v. *Deol* (1971) 23 D.L.R. (3d) 223 (B.C.S.C.).

DeLaurier v. *Jackson* (1934) 1 D.L.R. 790 at 791.

De Manneville v. *De Manville* (1804) 10 Ves. 52.

De Reneville v. *De Reneville* (1948) 1 All E.R. 56 (C.A.).

Devitt v. *Devitt* (1974) 12 R.F.L. 48 (Alta.).

Dimaggio v. *Dimaggio* (1971) 4 R.F.L. 3.

Dion v. *Dion* (1973) 3 W.W.R. 202.

Dixon v. *Dixon* (1878) 9 Ch. 587.

Dolphin v. *Robins* (1859) 7 H.L.C. 390.

Donaldson v. *Donaldson* (1958) 2 All E.R. 660.

Draycott v. *Harrison* 17 Q.B.D. 147.

Drew v. *Nunn* (1879) 4 Q.B.D. 661 (C.A.).

Drinkwater v. *Kimber* (1952) 2 Q.B. 281.

Duberlay v. *Day* 16 Beav., 51 E.R. 638.

Du Boulay v. *Du Boulay* (1869) L.R. 2 P.C. 430.

Duggan v. *Duggan* (1965) 51 D.L.R. (2d) 576.

Duncan v. *Duncan* (No. 1) (1950) 1 W.W.R. 545, (No. 2) (1950) 1 W.W.R. 571, affd. (1950) 1 W.W.R. 1003 (B.C.).

Durrant v. *Ricketts* (1881) 8 Q.B.D. 177.

Dyer v. *Dyer* (1788) 2 Cox Eq. 92 (Ch.).

Dyment v. *Dyment* (1969) 2 O.R. 748 at 750 (C.A.).

East v. *East* (1917-18) 13 O.W.N. 316.

Eaton v. *Eaton* (1870) L.R. 2C. & D.51.

Re, Eaves, Eaves v. Eaves (1939) 4 All E.R. 260.

Ebenal v. Ebenal (1971) 20 D.L.R. (3d) 545.

Edwards v. Bradley (1956) 2 D.L.R. (2d) 382 (Ont. C.A.).

Edwards v. Porter (1925) A.C. 21.

Einarson v. Einarson (1970) 20 D.L.R. (3d) 126.

Elibank v. Montolieu (1801) 5 Ves. 737.

Ells v. Ells (1970) 2 R.F.L. 186.

Re Emery's Investments Trust, Emery v. Emery (1959) Ch.410.

Falconer v. Falconer (1970) 3 All E.R. 449 (C.A.).

Farden v. Farden (1972) 3 R.F.L. 315 affd. 8 R.F.L. 183.

Favor v. Favor (1971) 5 W.W.R. 573.

Feldman v. Feldman (1970) 14 D.L.R. (3d) 222.

Ferris v. Weaver (1952) 2 All E.R. 233.

Fettiplace v. Gorges (1789) 1 Ves. Jun. 46.

Fiedler v. Fielder (1975) 3 W.W.R. 681.

Re Figgis, Roberts v. McLaren (1969) 1 Ch. 123.

Fish v. Fish 110 Sol. J. 228 (C.A.).

Fleet v. Fleet (1972) 26 D.L.R. (3d) 134.

Fleet v. Perrins (1869) 4 Q.B. 510.

Foote v. Foote (1971) 1 O.R. 338.

French v. Gething (1922) 1 K.B. 236.

Fribance v. Fribance (1957) 1 All E.R. 357 (C.A.).

G. v. G. (1970) 16 D.L.R. (3d) 107.

Galbraith v. Galbraith (1969) 8 D.L.R. (3d) 24.

Gardiner v. Gardiner (1920) 36 T.L.R. 294, 295.

Gebbie & Forrest v. Kershaw (1927) 3 D.L.R. 156.

George v. *Bank of England* (1819) 7 Price 646.

Gipps v. *Gipps* (1864) 11 E.R. 1230.

Glaister-Carlisle v. *Glaister-Carlisle* (1968) 112 Sol. J. 215.

Glaister v. *Hewer* (1903) 8 Ves. 195 at 199.

Godfrey v. *Godfrey* (1965) A.C. 444.

Goodyear v. *Part* (1897) 13 T.L.R. 395.

Gosling v. *Gosling* (1885) 3 Drew 335.

Gotliffe v. *Edelston* (1930) 2 K.B. 278.

Grandy v. *Grandy* (1972) 26 D.L.R. (3d) 359.

Grant v. *Callaghan* (1956) 107 L.J. 7. 105.

Miss Gray v. *Earl of Cathcart* (1922) 38 T.L.R. 562.

Re Green, Mansfield v. *Mansfield* (1890) 43 Ch.D. 12.

Greggain v. *Greggain* (1970) 73 W.W.R. 677 (B.C.).

Gregory v. *Goodenough* (1971) 1 All E.R. 497.

Gregory v. *Parker* (1808) 1 Comp. 394.

Grindell v. *Godmond* (1936) 5 Ad. & El. 755.

Gruert v. *Gruert* (1960) 32 W.W.R. 509 (Sask. Q.B.).

H. v. *H*. (1953) 2 All E.R. 1229.

Halden v. *Halden* (1966) 1 W.L.R. 1487.

Hall v. *Hall* (1971) 1 All E.R. 762 (C.A.).

Handy v. *Handy* (1973) 40 D.L.R. (3d) 485.

Hansford v. *Hansford* (1973) 9 R.F.L. 233.

Hardwick v. *Fox* (1971) 3 R.F.L. 153.

Hardy v. *Hardy* (1969) 2 O.R. 875.

Hargraves v. *Newton* (1971) 3 All E.R. 866.

Harnett v. *Harnett* (1973) Fam. 156 per Bagnall J. at 160.

Re Harrison, Day v. *Harrison* (1920) 90 L.J. Ch. 186.

Harrods v. *Tester* (1937) 2 All E.R. 236 (C.A.).

Hattie v. *Hattie* (1971) 3 R.F.L. 324.

Hawkes v. *Hawkes* (1928) 1 Hogg. Ecc. 526.

Hazell v. *Hazell* (1972) 1 All E.R. 923.

Herbert v. *Herbert et al*. (1936) 3 D.L.R. 141 (C.A.).

Heseltine v. *Heseltine* (1971) 1 All E.R. 952 (C.A.).

Hewar v. *Bryant* (1969) 2 All E.R. 578 at 582.

Hickens v. *Hickens* (1945) 1 All E.R. 451 at 453 (C.A.).

Hill v. *Hill* (1929) 2 D.L.R. 735.

Hillman v. *Hillman* (1972) 31 D.L.R. (3d) 44 (Ont.).

Hislop v. *Hislop* (1950) W.N. 124.

H.M. Advocate v. *H.D.* (1953) S.C. (J) 65.

Hock v. *Hock* (1970) 13 D.L.R. (3d) 356.

Hock v. *Hock* (1971) 4 W.W.R. 262.

Hodgins v. *Hodgins* (1942) O.R. 243.

Hood Barrs v. *Heriot* (1896) A.C. 174.

Hope v. *Hope* (1892) 2 Ch. D. 342.

Horne v. *Horne* (1972) 5 R.F.L. 394.

Hornsby v. *Lee* (1816) 2 Madd. 16.

Hotchkiss v. *Mayor* (1896) W.N. 175 (12).

Howard v. *Earl of Digby* (1834) 2 Cl. & Fin. 634 at 657, 660, 661 (H.L.).

Hudson v. *Carmichael* (1854) Kay 613.

Hulme v. *Tenant* (1778) 28 E.R. 958.

Hulton v. *Hulton* (1917) 1 K.B. 813.

Hunter v. *Hunter* (1973) 1 W.L.R. 948 at 961.

Hutchison v. *Hutchison* (1972) 25 D.L.R. (3d) 23.

Hyde v. *Hyde and Woodmansee* (1866) L.R. 1 P. & D. 130.

Iachetta v. Iachetta (1973) 11 R.F.L. 309.

I.H. v. H.H. (1971) 3 O.R. 222.

Indyka v. Indyka (1967) 2 All E.R. 689 (H.L.).

J. v. C. (1970) A.C. 668 at 710 (H.L.).

Jablonski v. Jablonski (1972) 28 D.L.R. (3d) 440 (Ont. S.C.).

Jackson v. Jackson (1972) 2 W.W.R. 321 (B.C.S.C.).

Jackson v. Jackson (1972) 29 D.L.R. (3d) 641 (Sup. Ct.).

Jacobs v. Davis (1917) 2 K.B. 532.

Jankov v. Jankov (1971) 16 D.L.R. (3d) 556.

Jansen v. Jansen (1965) 3 All E.R. 363 (C.A.).

Jaworski v. Jaworski (1973) 34 D.L.R. (3d) 44.

Jenner v. Morris (1861) 30 L.J. Ch. 361.

Jodrell v. Jodrell (1845) 9 Beav. 45.

Johnson v. Clark (1908) 1 Ch. D. 312.

Johnstone v. Johnstone (1969) 7 D.L.R. (3d) 14.

Judge v. Smith (1962) 30 D.L.R. (2d) 521.

Jupp v. Buckwell 39 Ch.D. 148.

Jussa v. Jussa (1972) 2 All E.R. 600.

Kearney v. Kearney (1970) 10 D.L.R. (3d) 138 (C.A.).

Kelner v. Kelner (1939) 3 All E.R. 957.

Kennedy v. Tomlinson (1959) 20 D.L.R. (2d) 273.

Kobayashi v. Kobayashi (1972) 26 D.L.R. (3d) 119.

Kowaliuk v. Kowaliuk (1971) 18 D.L.R. (3d) 16.

Krishnan. v. London Borough of Sutton (1970) Ch. 181.

Kumpas v. Kumpas (1971) 18 D.L.R. (3d) 609.

Lawson v. *Lawson* (1966) 56 W.W.WR. 576 (Man. C.A.).

Laxton (or Ulrich) v. *Ulrich* (1964) 1 O.R. 193.

Leach v. *The King* (1912) A.C. 305.

Leach v. *Way* (1835) S.L.J. 100 (Ch.).

Leake (formerly Bruzzi) v. *Bruzzi* (1974) 2 All E.R. 1196 (C.A.O.

Lean v. *Schultz* (1778) 2W.Bl.1195.

L.H. v. *L.H.H.* (1971) 20 D.L.R. (3d) 190.

Lieberman v. *Morris* (1944) 69 C.L.R. 69 (Aust. High Ct.).

Lineham v. *Holden* (1933) 4 D.L.R. 187.

Lipson v. *Lipson* (1972) 2 O.R. 401.

Liptack v. *Liptack* (1974) 1 W.W.R. 108 (Alta. S.C.).

Re Lloyds Bank Ltd. Bonze and Lederman v. *Bonze* (1931) 1 Ch. 289 at 302.

Loewen v. *Loewen* (1971) 2 R.F.L. 230 (B.C.S.C.).

Lord Advocate v. *Jaffrey* (1921) 1 A.C. 146.

Lotoski v. *Lotoski* (1970) 2 R.F.L. 64.

Luchek v. *Sitko* (1956) 18 W.W.R. 611 (Alta.).

M. v. *M.* (1972) 24 D.L.R. (3d) 114.

MacDougall v. *Macdougall* (1970) 3 O.R. 680.

Maclennan v. *Maclennan* (1958) S.L.T. 12 (Court of Session, Outer House).

Madden v. *Madden* (1970) 1r D.L.R. (3d) 100.

Maddock v. *Maddock* (1958) O.R. 810.

Mander v. *Harris* 27 Ch.D. 166.

Many v. *Scott* (1663) 1 Lev. 4.

Marks v. *Marks* (1971) 3 R.F.L. 339.

Marsellus v. *Marsellus* (1970) 13 D.L.R. (3d) 383.

Marsh v. *Marsh* (1974) 2 Ont. 436.

Marshall v. *Crutwell* (1875) L.R. 20 328 (Eq.).

Maskewycz v. *Maskewycz* (1974) 44 D.L.R. 180.

Masson, Templier & Co. v. *De Fries* (1909) 2 K.B. 831.

Mawji v. *Reginam* (1957) A.C. 126.

May v. *May* (1952).

Maynard v. *Maynard* (1969) P.88.

McDonald v. *McDonald* (1953) S.L.T. (Sh.Ct.) 36.

McGowan v. *McGowan* (1972) 2 Nfld. & P.E.I. 413.

McGuire v. *McGuire* (1873) 23 V.C.C.P. 123.

McKee v. *McKee* (1951) 2 D.L.R. 657 at 666 (P.C.).

McKenzie v. *Singh* (1973) 29 D.L.R. (3d) 380 (B.C.S.C.).

McMaster v. *McMaster* (1968) D.L.R. (2d) 404.

Mildon v. *Mildon* (1971) 1 Ont. 390.

Milne v. *Milne* (1970) 1 Ont. 381.

Minaker v. *Minaker* (1949) 1 D.L.R. 801.

Moore, McLeod & Co. Ltd. v. *Jardine* (1932) 5 M.P.R. 327.

More v. *More* (1974) 17 R.F.L. 5 (B.C.).

Morel v. *Westmoreland* (1904) A.C. 11.

Mortimore v. *Wright* (1840) 6 M. & W. 482.

Moshensko v. *Moshensko* (1969) 7 D.L.R. (3d) 749.

Mossing v. *Mossing* (1973) 31 D.L.R. (3d) 770.

Muetzel v. *Muetzel* (1970) 1 All E.R. 443 (C.A.).

Murray v. *Lord Elibank* (1804) 10 Ves. 84.

J.N. Nabaoor & Sons v. *Kennedy* (1954) 2 All E.R. 605.

National Provincial Bank Ltd. v. *Ainsworth* (1965) A.C. 1175 (H.L.).

Naumoff v. *Naumoff* (1971) 2 O.R. 676.

Neal v. *Neal* (1972) 29 D.L.R. (3d) 254.

Newgrosh v. *Newgrosh* (1950) 100 L.J. 525 (C.A.).

Newlands v. *Paynter* (1840) 4 My. & Cr. 408.

Newton v. *Edgerly* (1959) 3 All E.R. 337.

Re Nicholson, Nicholson v. *Perks* (1974) 1 W.L.R. 476 (Ch.).

Nielsen v. *Nielsen et al*. (1971) 1 O.R. 393.

Niles v. *Cooper* (1846) 9 Beav. 294.

Niles v. *Lake* (1974) 2 D.L.R. 248 (S.C.C.).

Nixon v. *Nixon* (1969) 3 All E.R. 1133 (C.A.).

Noble v. *Noble and Ellis (No. 2)* (1964) P.250.

Norman v. *Norman* (1973) 12 R.F.L. 252.

Nowlan v. *Nowlan* (1971) 2 R.F.L. 67.

O'Connor v. *Majoribanks* (1891) 4 M & Gr. 435.

Olson v. *Olson and Lazich* (1971) 3 W.W.R. 506.

Omelance v. *Omelance* (1971) 20 D.L.R. (3d) 425.

Orford v. *Orford* (1921) 58 D.L.R. (Ont. S.C.).

Outram v. *Hude* (1895) 24 W.R. 268.

Owen Sound General & Maine Hospital v. *Mann* (1953) O.R. 643.

Paget v. *Paget* (1898) 1 Ch. 470.

Palliser v. *Gurney* (1887) 19 Q.B.D. 519.

Papp v. *Papp et al*. (1970) 1 O.R. 331.

Paquin b. *Beauclerk* (1906) A.C. 148.

Paras v. *Paras* (1971) 1 O.R. 130 (C.A.), (1972) 8 R.F.L. 172.

Parkinson v. *Parkinson* (1939) 3 All E.R. 108.

Paskiewich v. *Paskiewich* (1968) 2 D.L.R. (3d) 622.

Penner v. *Penner and Godfrey*(1962) 40 W.W.R. 375 (B.C.S.C.).

Perkins v. *Perkins* (1972) 9 R.F.L. 349.

Perrin v. *Perrin* (1968) 3 D.L.R. (3d) 139.

Peters v. *Jones* (1914) 2 K.B. 781.

Pettitt v. *Pettitt* C.A. 777 at 824 (H.L.).

Petty v. *Petty* (1973) 1 W.W.R. 11 (Alta.).

Phillips v. *Barnet* (1876) 1 Q.B.D. 436.

Phillips v. *Hayter* (1870) L.R. 6 C.P. 38.

Phillips v. *Phillips* (1973) 2 All E.R. 423.

Philpott v. *Philpott* (1954) 3 D.L.R. 210 (Ont. C.A.).

Pike v. *Fitzgibbon* (1881) 17 Ch. D. 454.

Place v. *Searle* (1932) 2 K.B. 497.

Pope v. *Bushell & Co.* (1888) 4 T.L.R. 610 (C.A.).

Potinger v. *Wightman* (1817) 3 Mer. 67.

Powell v. *Powell* (1876) L.R. 3 P. & D. 186.

Re Price, Stafford v. *Stafford* (1885) 28 Ch. D. 709.

Prockiw v. *Prockiw* 4 D.L.R. 140.

Protheroe v. *Protheroe* (1968) 1 All E.R. 1111 (C.A.).

Pugh v. *Pugh* (1970) 16 D.L.R. (3d) 318.

Pyatt v. *Pyatt* (1966) S.L.T. (Notes) 73 where result as in *Tymoszczuk*.

The Queen v. *Brittleton* 12 Q.B.D. 266.

R. v. *Algar* (1954) 1 Q.B. 279 at 285.

R. v. *Clarke* (1949) 2 All E.R. 448.

R. v. *Cohen* (1868) 11 Cox C.C. 99.

R. *Cope* (1718/19) 1 Str. 144.

R. v. *Creamer* (1919) 1 K.B. 564.

R. v. *Cruse* (1838) 8 C. 2P 541.

R. v. *Davis* 9 J.Cr.L. 81.

R. v. *Deacon* (1973) 1 W.L.R. 696.

R. v. *Green* (1913) 9 Cr.App.R. 228.

R. v. *Griffin* (1869) 11 Cox 402.

R. v. *Jackson* (1891) 1 Q.B. 671.

R. v. *James* (1902) 1 K.B. 540.

R. v. *Lapworth* (1931) 1 K.B. 117.

R. v. *McConnell* (1968) S.C.R. 602, 4 C.R.N.S. 269, (1968) 4 C.C.C. 257
60 D.L.R. (2d) 149.

R v. *Miller* (1954) 2 Q.B. 282.

R. v. *Moore* (1954) 1 W.L.R. 893 at 898.

R. v. *Morley* (1966) 116 L.J. 725 (C.C.A.).

R. v. *Shepherd* (1862) Le. & Ca. 147.

R. v. *Sockett* (1908) 1 Cr. App. Rep. 101 (C.C.A.).

R. v. *Verolla* (1963) 1 Q.B. 295.

R. v. *Whitchurch* (1890) 24 Q.B.D. 420 (C.C.C.R.).

R. v. *Wickham, Ferrar and Bean* (1971) 55 Cr. App. Rep. 199 (C.A.).

R. v. *Woods* (1921) 85 J.P. 272.

R. v. *Yeo* (1951) i A.E.R. 864.

Raffin v. *Raffin* (1972) 1 O.R. 173.

Ralston v. *Ralston* (1930) 2 K.B. 238.

Rathwell v. *Rathwell* (1974) 16 R.F.L. 387 (Sask.).

Rees v. *Hughes* (1946) K.B. 517.

Restall v. *Restall* (1930) P. 189.

Richards v. *Richards* (1972) 26 D.L.R. (3d) 264.

Richardson v. *Richardson* (1971) 17 D.L.R. (3d) 481.

Rimmer v. *Rimmer* (1953) 1 Q.B. 63 (C.A.).

Robert Simpson Co. Ltd. v. *Ruggles* (1930) 3 D.L.R. 174.

Robinson v. *Robinson* (1968) C.C.L. 20.

Rooney v. *Rooney* (1969) 68 W.W.R. 641 (Sask. Q.B.).

Rose v. *Rose* (1951) P.29.

Royal Trust Co. v. *Globe Printing Co. Ltd. et al*. (1934) O.W.N. 547.

Rumpling v. *Director of Public Prosecutions* (1964) A.C. 822 (H.L.).

Ryan v. *Sams* (1848) 12 Q.B. 460.

S. v. *S*. (1963) P. 162.

S. v. *S. and P*. (1962) 2 All E.R. 1 per Willmer L.J. at 3.

Sampson v. *Sampson* (1960) 1 W.L.R. 190.

Savage v. *Savage* (1971) 16 D.L.R. (3d) 49.

Savelieff v. *Savelieff* (1973) 35 D.L.R. (3d) 364.

Saxton v. *Saxton* (1973) 3 W.W.R. 219.

Schuett v. *Schuett* (1970) 3 O.R. 206.

Scott v. *Morley* (1888) 20 Q.B.D. 120.

Re Scott, Palmer v. *Vickers* (1907) 97 L.T. 537.

Scott v. *Scott and Pfeil* (1946) O.R. 832.

Scott v. *Sebright* (1886) 12 P.D. 21.

Seroka v. *Kattenburg* (1886) 17 Q.B.D. 177.

Seymour v. *Tresilian* 3 Atk. 358.

Sharpe v. *Sharpe* (1971) 18 D.L.R. (3d) 380.

Shenton v. *Tyler* (1939) 1 All E.R. 827 C.A.

Silver v. *Silver* (1955) 2 All E.R. 614.

Silver v. *Silver* (1958) 1 All E.R. 523 (C.A.).

Simon v. *Simon* (1971) 115 Sol. J. 673.

Slater v. *Parker* (1908) 24 T.L.R. 621.

Slon v. Slon (1969) 2 W.L.R. 375.

Smith v. Moss (1940) 1 K.B. 242.

Smith v. National Trust Co. (1959) 15 D.L.R. (2d) 520.

Smith v. Smith (1952) 3 D.L.R. 449.

Smith v. Smith (1970) 74 W.W.R. 462.

Smith v. Smith (1971) 1 W.W.R. 409.

Re Smith's Estate, Bilham v. Smith (1937) Ch. 636.

Snively v. Snively (1971) 19 D.L.R. (3d) 628.

Spellman v. Spellman (1961) 1 W.L.R. 921.

Standard Trust Co. v. Little (1918) 7 W.W.R. 1285 (Sask. S.C.).

Steinhuebl v. Steinhuebl (1970) 2 O.R. 683.

Stevenson v. Stevenson (1970) 2 R.F.L. 89.

Strachan v. Strachan (1970) 14 D.L.R. (3d) 125.

Stransky v. Stransky (1954) P.428.

Struk v. Struk (1970) 14 D.L.R. (3d) 630.

Stuart v. Board of Supervisors of Elections (1972) 266 Md. 440. 295 A. 2d. 223.

Suriano v. Suriano (1972) 1 O.R. 125.

Switzer v. Switzer (1970) 7 D.L.R. (3d) 638 (Alta. S.C.).

Sykiotis v. Sykiotis (1966) 2 O.R. 428.

Szymczak v. Szymczak (1970) 3 O.R. 202.

T. v. T. (1970) 10 D.L.R. (3d) 125.

Tannis v. Tannis (1970) 8 D.L.R. (3d) 333.

Tapson v. Tapson (1970) 1 O.R. 521.

Tarr v. Tarr (1972) 2 All E.R. 295.

Taylor v. Meads (1865) 34 L.J. Ch. 203.

Thomas v. Thomas (1961) 29 D.L.R. 576.

Thomas v. Times Book Co. Ltd. (1966) 2 All E.R. 241.

Thompson v. Thompson (1956) 1 All E.R. 603, 608.

Thornley v. Thornley (1893) 2 Ch. D. 229.

Tilley v. Tilley (1949) P.240.

Tingley v. Tingley et al. 3 O.R. 179.

Tinkley v. Tinkley (1909) 25 T.L.R. 264.

Todd v. Todd (1969) 5 D.L.R. (3d) 92.

Re Solemnization of Marriage Act, Tomberg v. Tomberg (Gilbert) (1942) 3 D.L.R. 687.

Tullett v. Armstrong (1840) 4 My. & Cr. 377.

Tymoszczuk v. Tymoszczuk (1964) 109 Sol. J. 676.

Ulrich v. Ulrich and Fenton (1968) 1 All E.R. 67 (C.A.).

Vance v. Vance (1839) 1 Beav. 605.

Vaughn v. Vaughn (1953) 1 All E.R. 209 (C.A.).

Veysey v. Veysey (1972) 16 D.L.R. (3d) 239.

Vlassie v. Vlassie (1974) 26 D.L.R. (3d) 471 (Man.).

Vogt v. Vogt (1970) 3 N.S. (2d) 225.

Vopni v. Bell (1908) 17 Man. L.R. 417.

Wabarro v. Kennedy (1955) 1 Q.B. 575.

Wachtel v. Wachtel (1973) 1 All E.R. 829.

Wagner v. Wagner (1970) 73 W.W.R. 474 (Alta.).

Wallace v. Wallace (1973) 2 W.W.R. 763.

Waller v. Waller (1956) P.300.

Walrond v. Walrond (1858) John. 18.

Ward v. Ward 14 Ch. D. 506.

Wassill v. Wassill (1951) 4 W.W.R. (N.S.) 669 (Sask.).

Way v. Way (1950) P.71.

Weingarten v. *Engel* (1947) 1 All E.R. 425.

Wenhak v. *Morgan* (1888) 20 Q.B.D, 635.

Wenman v. *Ash* (1853) 13 C.B. 844.

Willis v. *Barron* (1902) A.C. 271 (H.L.).

Williston v. *Williston* (1962) 30 D.L.R. (3d) 746.

Willoughby v. *Willoughby* (1951) P.184 (C.A.).

Wilson v. *Wilson* (1957) 21 W.W.R. 28 (B.C.S.C.).

Wong v. *Wong* (1972) 6 W.W.R. 161.

Wood v. *Wood* (1968) 2 D.L.R. (3d) 527.

Wright & Webb v. *Annandale* (1930).

Yanoshewski v. *Yanoshewski* (1973) 40 D.L.R. (3d) 461.

Re Young, Trye v. *Sullivan* (1885) 28 Ch. 705.

Zacks v. *Zacks* (1973) 35 D.L.R. (3d) 420 at 429.

ENGLISH STATUTES

Evidence Amendment Act (1853) 16 & 17 Vict. c.83.

Malin's Act (1857) 20 & 21 Vict. c.57.

Divorce and Matrimonial Causes Act 1857 21 & 22 Vict. c.85.

Offences Against the Person Act 1861.

British North America Act 1867 40 & 41 Vict. c.3.

Poor Law Amendment Act 1868.

Evidence Further Amendment Act (1869) 32 & 33 Vict. c.69.

Married Women's Property Act (1870) 33 & 34 Vict. c.93.

Custody of Infants Act 1873.

Married Women's Property Act (1874) 37 & 38 Vict. c.50.

Married Women's Property Act (1882) 45 & 46 Vict. c.75.

Married Women's Property Act (1884) 47 & 48 Vict. c.14.

Prevention of Cruelty to, and Protection of, Children Act 1889.

Intestates' Estates Act (1890) 53 & 54 Vict. c.39.

Married Women's Property Act (1893) 56 & 57 Vict. c.63.

Prevention of Cruelty to Children Act 1894.

Criminal Evidence Act (1898) 61 & 62 Vict. c.36.

Prevention of Cruelty to Children Act 1904.

Bankruptcy Act 1914.

Larceny Act (1916) 6 & 7 Geo.5 c.50.

Administration of Estates Act (1925) 15 Geo.5 c.23.

Law of Property Act 1925 15 & 16 Geo.5 c.20.

Criminal Justice Act 1925 15 & 16 Geo.5 c.86.

Guardianship of Infants Act (1925) 15 & 16 Geo.5 c.45.

Children and Young Persons Act 1933 23 Geo.5 c.12.

Law Reform (Married Women and Tortfeasors) Act (1935) 25 & 26 Geo.5 c.30.

Matrimonial Causes Act (1937) 1 Edw.8 & 1 Geo.6 c.57.

Infanticide Act 1938 1, 2 Geo.6 c.36.

Inheritance (Family Provision) Act (1938) 1 & 2 Geo.6 c.45.

Education Act 1944 Geo.6 c.31.

Family Allowance Act 1945 8 & 9 Geo.6 c.41.

National Insurance Act 1946 9 & 10 Geo.6 c.67.

National Insurance (Married Women) Regulations (1948) s.1 1948 No. 1470.

British Nationality Act 1948 11 & 12 Geo.6 c.56.

National Assistance Act 1948 11 & 12 Geo.6 c.29.

Children Act 1948 11 & 12 Geo.6 c.43.

Marriage Act 1949 12, 13, 14 Geo.6 c.76.

Matrimonial Causes Act (1950) 14 Geo.6 c.25.

Intestates' Estates Act (1952) 15 & 16 Geo. 6 & 1 Eliz.2 c.64.

Adoption Act 1958 7 Eliz.2 c.5.

Matrimonial Causes (Property and Maintenance) Act 1958.

Matrimonial Proceedings (Magistrates' Courts) Act 1960.

Crimes Act 1961.

Law Reform (Husband and Wife) Act 1962 10 & 11 Eliz.2 c.48.

Matrimonial Causes Act (1965) c.72.

Family Provision Act 1966 c.35.

Ministry of Social Security Act 1966 c.20.

Abortion Act 1967 c.87.

Matrimonial Homes Act 1967 c.75.

Theft Act 1968 c.60.

Family Law Reform Act 1969.

Law Reform (Miscellaneous Provisions) Act 1970 c.45.

Matrimonial Proceedings and Property Act 1970 c.33.

Guardianship of Minors Act 1971 c.3.

Guardianship Act 1973 c.29.

Matrimonial Causes Act 1973 c.18.

Domicile and Matrimonial Proceedings Act 1973 c.45.

Children Bill 1974.

CANADIAN STATUTES

Dower Act s.s. 1915 c.29.

Marriage Act R.S.M. 1940 c.126.

Divorce and Matrimonial Causes Act R.S.B.C. 1948 c.97.

Probate Act R.S.P.E.I. 1951 c.124.

Children's Act R.S.P.E.I. 1951 c.23.

School Act R.S.P.E.I. 1951 c.145.

Change of Name Act R.S.P.E.I. 1951 c.22.

Married Women's Property Act R.S.P.E.I. 1951 c.92.

Married Women's Property Act R.S.N.S. 1952 c.168.

Married Women's Property Act R.S.N.B. 1952 c.140.

Divorce Court Act R.S.N.B. 1952 c.63.

Deserted Wives and Childrens Act R.S.N.B. 1952 c.61.

Devolution of Estates Act R.S.N.B. 1952 c.62.

Married Women's Property Act R.S.Nfld. 1952 c.143.

Married Women's Property Act R.S.A. 1953 c.193.

Alimony Act R.S.N.S. 1954 c.7.

Of The Court of Marriage and Divorce R.S.N.S. 1954 Vol.IV.

Act to Amend the Laws Relating to Divorce and Matrimonial Causes R.S.N.S. 1954 Vol.IV.

Queens Bench Act R.S.M. 1954 c.52.

Married Women's Property Act R.S.M. 1954 c.156.

Domestic Relations Act R.S.A. 1955 c.89.

Maintenance Order Act R.S.A. 1955 c.188.

Seduction Act R.S.A. 1955 c.303.

Change of Name Act R.S.N.B. 1955 c.5.

Testator's Family Maintenance Act N.B.S. 1959 c.14.

Married Women's Property Act R.S.B.C. 1960 c.233.

Change of Name Act R.S.B.C. 1960 c.50.

Equal Guardianship of Infants Act R.S.B.C. 1960 c.130.

Social Assistance Act R.S.B.C. 1960 c.360.

Dower Act R.S.B.C. 1960 c.175.

Public Schools Act R.S.B.C. 1960 c.319.

Divorce and Matrimonial Causes Act R.S.B.C. 1960 c.118.

Wives' and Childrens' Maintenance Act R.S.B.C. 1960 c.409.

Testator's Family Maintenance Act R.S.B.C. 1960 c.378.

Administration Act R.S.B.C. 1960 c.3.

Married Women's Property Act R.S.O. 1960 c.229.

Social Assistance Act N.B. 1960 c.9.

Queens Bench Act R.S.S. 1960 c.35.

Social Assistance Act Nfld. 1962 c.4.

Family Relief Act S. Nfld. 1962 c.56.

Married Women's Property Act R.S.Nfld 1963 c.227.

Change of Name Act R.S.S. 1965 c.408.

Infants Act R.S.S. 1965 c.342.

Married Women's Property Act R.S.S. 1965 c.340.

Intestate Succession Act R.S.S. 1965 c.126.

Deserted Wives and Childrens Act R.S.S. 1965 c.341.

Land Titles Act R.S.S. 1965 c.115.

Defendants' Relief Act R.S.S. 1965 c.128.

School Attendance Act R.S.S. 1965 c.186.

Saskatchewan Assistance Act S.S. 1966 c.32.

Married Women's Property Act R.S.N.S. 1964 c.176.

Infants Custody Act R.S.N.S. 1967 c.145.

Change of Name Act R.S.N.S. 1967 c.30.

Education Act R.S.N.S. 1967 c.81.

Testator's Family Maintenance Act R.S.N.S. 1967 c.303.

Intestate Succession Act R.S.N.S. 1967 c.153.

Statutes of Quebec 1969 c.77.

Dower Act R.S.A. 1970 c.114.

Family Relief Act R.S.A. 1970 c.134.

School Act R.S.A. 1970 c.329.

Legitimacy Act R.S.A. 1970 c.205.

Domestic Relations Act R.S.A. 1970 c.113.

Intestate Succession Act R.S.A. 1970 c.190.

Family Court Act R.S.A. 1970 c.133.

Marriage Act R.S.A. 1970 c.226.

Married Women's Property Act R.S.A. 1970 c.227.

Age of Majority Act S.B.C. 1970 c.2.

Medical Care Act R.S.C. 1970 c.M-8.

Indian Act R.S.C. 1970 c.1-6.

Hospital Insurance and Diagnostic Services Act R.S.C. 1970 c.H-8.

Canadian Citizenship Act R.S.C. 1970 c.C-19.

Divorce Act R.S.C. 1970 c.D-8.

Criminal Code R.S.C. 1970 c.34.

Canada Assistance Plan R.S.C. 1970 c.C-1.

Criminal Code R.S.C. 1970 c.34.

Canada Evidence Act R.S.C. 1970 c.E-10.

Divorce Act R.S.C. 1970 c.D-8.

Bankruptcy Act R.S.C. 1970 c.B-3.

Old Age Security Act R.S.C. 1970 c.0-6.

Child Welfare Act R.S.M. 1970 c.C80.

Age of Majority Act S.M. 1970 c.91.

Wives and Childrens' Maintenance Act R.S.M. 1970 c.W170.

Dower Act R.S.M. 1970 c.D-100.

Testator's Family Maintenance Act R.S.M. 1970 c.T-50.

School Attendance Act R.S.M. 1970 c.S.20.

Married Women's Property Act R.S.M. 1970 c.M70.

Social Allowance Act R.S.M. 1970 c.S.160.

Devolution of Estates Act R.S.M. 1970 c.D70.

Change of Name Act R.S.M. 1970 c.33.

School Attendance Act R.S.N. 1970 c.345.

Intestate Succession Act R.S.N. 1970 c.183.

Schools Administration Act R.S.O. 1970 c.424.

Dower Act R.S.O. 1970 c.135.

Infants Act R.S.O. 1970 c.222.

Child Welfare Act R.S.O. 1970 c.64.

Devolution of Estates Act R.S.O. 1970 c.129.

Deserted Wives and Childrens Act R.S.O. 1970 c.128.

Married Women's Property Act R.S.O. 1970 c.262.

Dependant's Relief Act R.S.O. 1970 c.126.

Conveyancing and Law of Property Act R.S.O. 1970 c.85.

Family Benefits Act R.S.O. 1970 c.157.

Change of Name Act R.S.O. 1970 c.66.

Social Assistance Act N.S. 1970 c.16.

Coming of Age Act S.S. 1970 c.8.

Age of Majority Act N.S. 1970-71 c.10.

Married Women's Property Act R.S.P.E.I. 1971 c.92.

Age of Majority Act S.A. 1971 c.1.

Age of Majority and Accountability Act S.O. 1971 c.98.

Change of Name Act S.M. 1971 c.69.

Minors (Attainment of Majority) Act S.Nfld. 1971 No.71.

Family Relations Act S.B.C. 1972 c.20.

Family Relations Act S.B.C. 1972 c.20.

Guardianship of Children Act N.B.S. 1973 c.11.

Change of Name Act S.A. 1973 c.63.